TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 713.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

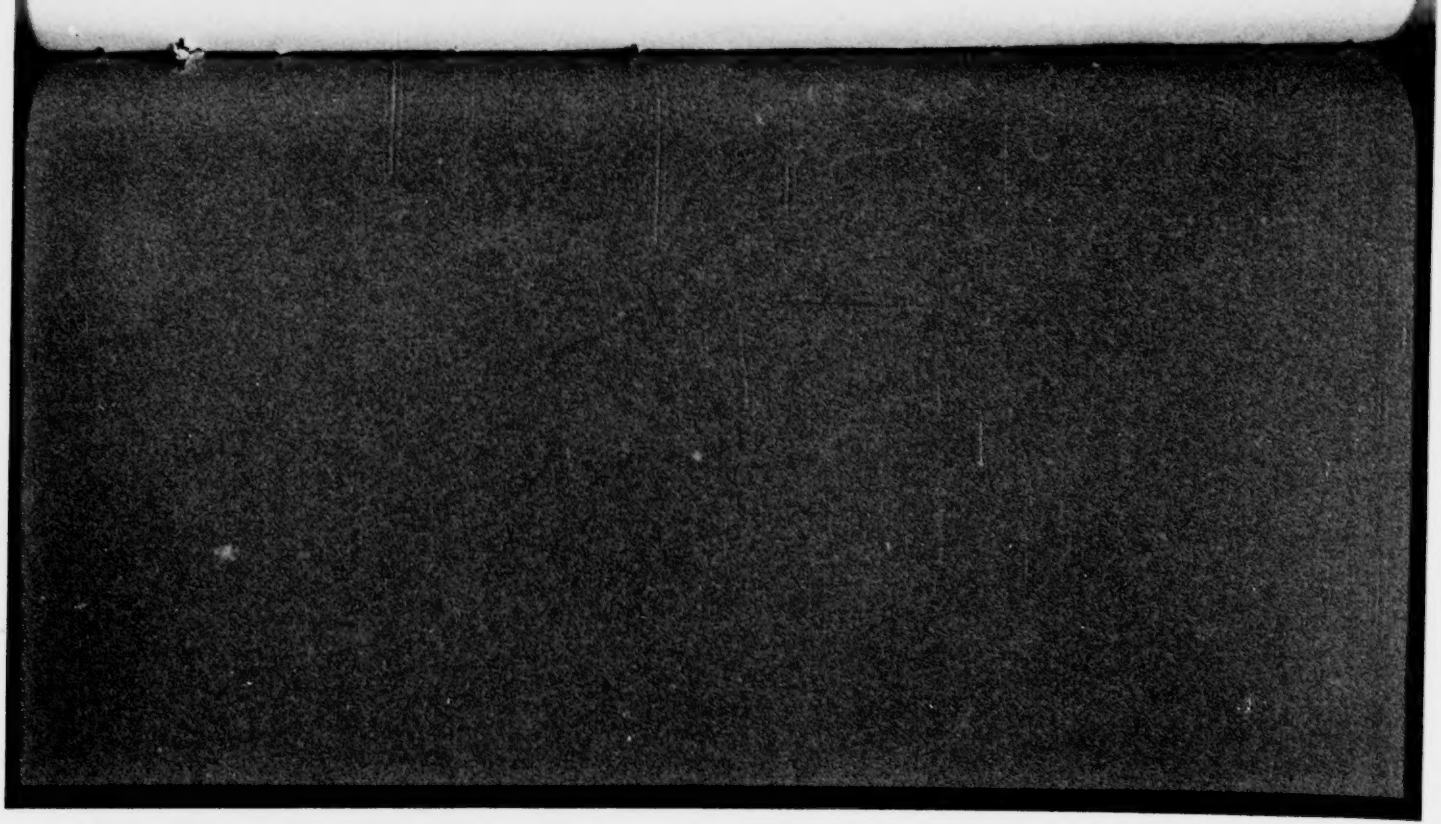
vs.

CLARA V. PADGETT, ADMINISTRATRIX OF THE ESTATE OF LEWIS H. PADGETT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED NOVEMBER 30, 1904.

(24,454)



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a THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1914, Eleventh Circuit, Lexington County.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Before Honorable T. H. Spain, Circuit Judge.

Case for Appeal.

W. Boyd Evans, Thurmond, Timmerman & Callison, W. H. Sharpe, Melton & Sturkie, James H. Fanning, A. D. Martin, Attorneys for Plaintiff-Respondent.
C. M. Efird, Lyles & Lyles, Attorneys for Defendant-Appellant.

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C. M. Efird, Lyles & Lyles, Attorneys for Defendant-Appellant.

2 *Statement.*

This action was commenced on June 20th, 1913, by the service of a Summons and Complaint. Thereafter, on motion of the defendant, the Complaint was required to be made more definite and certain as to the allegations of the eighth paragraph, and in conformity to that order the following Complaint was served:

Complaint.

The plaintiff above named, as administratrix of the estate of Lewis H. Padgett, deceased, complaining of the defendant herein, alleges:

I. That the plaintiff is informed and believes that the defendant, the Seaboard Air Line Railway, is now and was at the time hereinafter mention-, a corporation duly organized and existing under and by virtue of the laws of the States of Virginia, North Carolina and South Carolina.

II. That the said defendant, the Seaboard Air Line Railway, owns and operates and at the time hereinafter mentioned, owned and operated a line of railroad extending from the City of Columbia, in the County of Richland, State of South Carolina, to and beyond Cayce, a station on its said line of railroad, in the County of Lexington, State of South Carolina, and on through the State of South Carolina into the State of Georgia, and to the City of Savannah, State of Georgia and beyond that point, and that it does now and did at the time hereinafter mentioned, own*ed* and operate*d* and control*led* the locomotive engines, flat cars, box cars and other appurtenances necessary to the running and conducting of a general railroad business in and through the States of Virginia, North Carolina, South Carolina and Georgia; and the defendant does now, and did
3 at the time hereinafter mentioned, own and control a railroad yard compo-ed of several tracks, roundhouse and other appurtenances at or near the station of Cayce, in Lexington County, South Carolina.

III. That the plaintiff's intestate at the time of his death was discharging his duties as an interstate employee and was in the employment and service of the defendant, Seaboard Air Line Railway, as locomotive engineer, and that the Seaboard Air Line Railway at the said time was engaged in interstate traffic running through the States of Virginia, North Carolina, South Carolina and Georgia. That the plaintiff's intestate, Lewis H. Padgett, was discharging his duties at the time of his death as a locomotive engineer, running between the City of Savannah, Georgia, and Cayce, on its said line of railroad, in the County of Lexington, South Carolina.

IV. That on the 5th day of June, 1913, in pursuance of a decree and judgment of the Court of Probate for Richland County, the plaintiff herein was duly granted letters of administration of the goods and chattels, rights and credits of the said Lewis H. Padgett, and as a duly qualified administratrix thereof has duly entered upon and is now engaged in the discharge of the duties and trusts thereby imposed.

V. That Lewis H. Padgett, late of the City of Savannah and State of Georgia, came to his death at or near the Station of Cayce, on the said line of railroad, at the time and in the manner hereinafter stated, on or about the 12th day of January, 1913, dying intestate, and leaving as his only heirs-at-law and distributees, his widow, Clara V. Padgett, the plaintiff herein, and the following children, namely:

Rosa Lee Padgett, aged sixteen years; Daisy Padgett, aged fifteen years; Clayton Padgett, aged twelve years; Ollie Padgett, aged ten
4 years; Nadean Padgett, aged six years; Ioma Padgett, aged four years; Theo Padgett, aged three years; Margaret Padgett, aged five months, and that this action is brought by the plaintiff for the benefit of herself and said children, namely: Rosa Lee Padgett, aged sixteen years; Daisy Padgett, aged fifteen years; Clayton Padgett, aged twelve years; Ollie Padgett, aged ten years; Nadean Padgett, aged six years; Ioma Padgett, aged four years; Theo Padgett, aged three years; Margaret Padgett, aged five months, under an Act of Congress, passed April 22, 1908, and amendments thereto known as the Federal Employers' Liability Act.

VI. That at a certain point near the defendant's Station of Cayce, South Carolina, on the line of railroad owned and operated by the defendant as aforesaid, there was and is located a roundhouse and pit in the said roundhouse, which was used and operated by the defendant for the use and operation of its engines and trains from the Station of Savannah, Georgia, through South Carolina, North Carolina and Virginia.

VII. That on or about the 12th day of January, A. D. 1913, plaintiff's intestate, while in the employment and service of the defendant, Seaboard Air Line Railway, as a locomotive engineer, fell into the said pit, situated and located in the said roundhouse, near the Station of Cayce, on the line of the said defendant, Seaboard Air Line Railway, as aforesaid, falling a distance of about twelve or fifteen feet, instantly killing plaintiff's intestate.

VIII. That the death of plaintiff's intestate, Lewis H. Padgett, was caused by the negligence of the defendant, its officers, agents and employees by reason of defects and insufficient appliances in its roundhouse, located at Cayce's, South Carolina, and from the negligence and carelessness of its officers, agents and employees in allowing its roundhouse at Cayce's, South Carolina, to be used by its employees before it was completed and while in an unsafe and dangerous condition, and in directing and permitting Lewis H. Padgett to go to his engine, which was in the roundhouse,
5 standing over this open, unprotected drop pit in the night-time while it was dark and no lights installed in this roundhouse or other protection to prevent him from walking or falling into this dangerous pit, over which his engine was standing and had been placed for repairs; and in not relieving the said L. H. Padgett from duty on the night he was killed; but, on the other hand, holding him on duty and in suspense during the said night. That the defendant, the Seaboard Air Line Railway, its officers, agents and employees, were careless and negligent by reason of defects and insufficiencies in its roundhouse and pit constructed therein, at or near the Station of Cayce, South Carolina. That the said defendant's roundhouse and pit at the time of plaintiff's intestate's death was in the course of construction and had not been completed, and had not been propertly equipped with lights, and the said pit had been left open and unguarded and unlighted.

IX. That on the night plaintiff's intestate was killed it was a

dark night and the said roundhouse and pit were unlighted and unguarded, and it was necessary for plaintiff's intestate, in coming from the City of Savannah, Georgia, to the Station of Cayce, South Carolina, to run his said engine into the said roundhouse over the said pit, which was unguarded and unlighted or otherwise protected, and plaintiff's intestate, while discharging his duties to the said defendant, Seaboard Air Line Railway, as its employee, fell into the said pit and was instantly killed.

X. That the defendant, Seaboard Air Line Railway, was careless and negligent in furnishing and maintaining an unsafe and dangerous place, the roundhouse and pit aforesaid, in which and upon which plaintiff's intestate was required to perform the duties assigned him as locomotive engineer, and in carelessly and negligently failing to maintain in a reasonably safe, suitable and proper condition the said roundhouse and pit in which plaintiff lost his life.

6 XI. That in consequence of the wrongful death of the said Lewis H. Padgett, the plaintiff's intestate, in the manner and as a result of the acts and carelessness and negligence hereinbefore described and characterized, the plaintiff and children of the plaintiff's intestate, for whom and for whose benefit this action is brought, have suffered great actual pecuniary loss, and the children have been deprived of the care, advice and education by the father to their grievous injury, and the plaintiff and children of the plaintiff's intestate have been greatly damaged in the sum of seventy-five thousand ($75,000.00) dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of seventy-five thousand ($75,000.) dollars, and for the costs of this action and for such other and further relief as may be meet and proper.

W. BOYD EVANS,
JAMES H. FANNING,
Attorneys for Plaintiff.

STATE OF SOUTH CAROLINA,
County of Lexington:

Personally appeared before me, Clara V. Padgett, Administratrix of the estate of Lewis H. Padgett, and made oath that the foregoing Complaint is true, of her own knowledge, except as to the allegations therein stated on information and belief, and as to those she believes it to be true.

CLARA V. PADGETT.

Sworn to and subscribed before me this 5th day of June.

W. BOYD EVANS, [L. S.]
Notary Public for S. C.

7 To this Complaint the defendant duly served the following:

Answer.

The defendant, herein, reserving the right to make its motion to require the Complaint to be made more definite and certain, and to strike out certain portions of the Complaint, notice of which has heretofore been served, and reserving the further right to amend this Answer in the event that the said Complaint is amended as a result of said motion, makes the following Answer to the Complaint:

For a first defense:

1. It admits the allegation of paragraph one.

2. It admits the allegations of paragraph two.

3. It admits so much of paragraph three as alleges that the defendant was, at the time of the death of plaintiff's intestate, engaged in interstate traffic, running through the States of Virginia, North Carolina, South Carolina and Georgia, but, upon information and belief, it denies each and every other allegation in said paragraph three contained.

4. It denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph four.

5. It admits, upon information and belief, that Lewis H. Padgett came to his death at or near the Station of Cayce, on or about the 12th day of January, 1913, but it denies knowledge or information sufficient to form a belief as to each and every other allegation in paragraph five contained.

6. It admits the allegations of paragraph six.

7. Upon information and belief, it denies each and every allegation contained in paragraph seven.

8. Upon information and belief, it denies each and every allegation contained in paragraph eight.

8 9. Upon information and belief, it denies each and every allegation contained in paragraph nine.

10. Upon information and belief, it denies each and every allegation contained in paragraph ten.

11. Upon information and belief, it denies each and every allegation contained in paragraph eleven.

For a second defense:

It alleges that on or about the 12th day of January, 1913, Lewis H. Padgett, plaintiff's intestate, was in the employment of the defendant as locomotive engineer in charge of engines and trains running between the City of Savannah, Georgia, and the Station of Cayce, or Columbia, South Carolina, but defendant alleges, upon information and belief, that on the night and at the time the said Lewis H. Padgett came to his death, he was not performing any duties as engineer for the defendant or otherwise, but, on the contrary, had registered off several hours before the time of his death, and that if said Lewis H. Padgett went into the roundhouse of this defendant and fell into a pit therein, which defendant does not admit, he was a trespasser in so doing, without permission or license of this defendant, and not in the performance of any duties owed by him to this defendant, and in going into the roundhouse when

he well knew, or should have known, that the same was in darkness and without lights, and contained dangerous pits, into which he might fall, and in failing to watch out and avoid said pit or pits, if he did fall therein, plaintiff's intestate, Lewis H. Padgett, was guilty of negligence, which, combining and concurring with the negligence of the defendant, if it was negligent, operated as a proximate cause of his own injuries, without which it would not have occurred.

9 For a third defense:

That plaintiff's intestate was entirely familiar with the roundhouse of the defendant at Cayce, and well knew, or by the exercise of due care, should have known, the danger of going therein in the darkness, or without exercising due care to avoid falling into the pits found in said roundhouse, and plaintiff's said intestate was guilty of negligence in going into the said roundhouse, and in failing to exercise due care to avoid said pit or pits and in falling therein, and that such negligence on the part of plaintiff's intestate, combining and concurring with the negligence of this defendant, if it was negligent, operated as a proximate cause of his own injury, without which it would not have occurred.

For a fourth defense:

Alleges, upon information and belief, that, if the said Lewis H. Padgett, plaintiff's intestate, went into the roundhouse of the defendant in the performance of any duties owed by him as locomotive engineer, which, however, this defendant denies, that he assumed the danger and risk of falling into the open pit or pits therein, because the said Lewis H. Padgett had been for a long time in the service of the defendant as locomotive engineer, running to the Station of Cayce, where the roundhouse was located, and, at the time of the construction of said roundhouse, he well knew and became informed of the danger and risk caused therein by the necessary location of said pit or pits, which danger and risk were open and obvious, and well known to the said Lewis H. Padgett, as incidents of his employment, and were assumed by him.

C. M. EFIRD,
LYLES & LYLES,
Attorneys for Defendant.

10 The Answer was properly verified by an officer of defendant.

Upon these pleadings the cause come on to be tried before Hon. T. H. Spain, Circuit Judge, and a jury in the Court of Common pleas for Lexington County on February 10th-12th, 1914, at which time the following proceedings were had, as shown by the stenographer's

Transcript.

After disposing of the motion to strike out, announcement of ready was entered. Upon request the Court propounded the usual question of relationship and connection with the defendant. There being no response, the jury list was then handed out and the jury

were selected and called to their seats and sworn. Before being sworn, the question of relationship, etc., was again propounded to the jurors. No response.

The following proceedings were had:

Plaintiff's Testimony.

C. M. CLINE, white, sworn.

Direct examination by Mr. EVANS:

Q. What is your age?
A. 29.
Q. What are you doing now?
A. Working for the Southern Railway.
Q. Southern Railway?
A. Yes, sir.
Q. In what capacity?
A. Switchman.
Q. Switchman?
A. Yes, sir.
Q. What position were you holding January, 1913,—last year?
A. Conductor.
Q. For what company?
A. The Seaboard.
Q. At what place?
A. Cayce and Columbia.
11 Q. Conductor on what train or engine?
A. I attended to the roundhouse, piloting the hostlers.
Q. Piloting the hostlers?
A. Yes, sir.
Q. Do you remember what time you went on duty on Saturday, the 11th of January?
A. Yes, sir.
Q. What time?
A. Four o'clock in the afternoon.
Q. When did you go off duty?
A. At seven o'clock the next morning.
Q. Do you remember when the officers of the railroad began to use—or had you all used the new roundhouse at Cayce?
A. Yes, sir.
Q. What day was that?
A. I think it was about the first of the year.
Q. Do you remember what day of the week it was you all went in there?
A. On Sunday.
Q. Look at this calendar for January, 1913, and see when the first Sunday of that month was—was it not the 5th?
A. Yes, sir.
Q. Was that the first Sunday in January, 1913?
A. If the calendar is correct.
Q. That must have been the date; Sunday was what day of the month?

A. I do not remember.
Q. Look at the calendar again?
A. The calendar says the 5th.
Q. Would not the calendar be the proper thing to go by?
A. Yes, sir.
Q. We introduce this calendar in evidence, and will use it later on.

(Exhibit 1.) See appendix.

Q. How long after that was it that Mr. Padgett got killed?
A. What date.
Q. Yes?
A. The night of the 11th or morning of the 12th.
Q. Look at this calendar and see if that was not the following Saturday and Sunday?
A. Yes, sir; just a week.
Q. Just a week later?
A. Yes, sir.
12 Q. How many days had the employees been using the roundhouse.

Mr. EFIRD: We object to him leading the witness; he wants to put the questions in the form of leading questions.
The COURT: I do not think that is leading.

Mr. EVANS:

Q. How many days from the time the employees began using the roundhouse until Mr. Padgett was killed?
A. Five or six days; I don't know exactly.
Q. That was a new roundhouse, was it not?
A. Yes, sir.
Q. What was the condition of that roundhouse when you were allowed to use it on the 5th of January?
A. In what way do you mean?
Q. As to its being completed?
A. They were still working on it at the time.
Q. Still working on it?
A. Yes, sir.
Q. Had any lights been put in it?
A. No, sir.
Q. Had the drop pits been covered?
A. No, sir.

Mr. EFIRD: He is leading the witness.
The COURT: That was leading; there is no doubt about that.

Mr. EVANS:

Q. What was the condition of the roundhouse the night that Mr. Padgett was killed?
A. There were no lights in the roundhouse.
Q. What was the condition of the pit?
A. The pit was not covered—it was wide open.
Q. About how deep was that pit, just approximately?

A. I suppose eight or ten feet.

Q. Do you remember how long after Mr. Padgett was killed before they covered that pit up.

Mr. LYLES: We object; it is in the nature of subsequent repairs; the matter of whether or not they covered the pit up after the death of Mr. Padgett, or any other time, is irrelevant and relates to subsequent repairs.

13 The COURT: Yes, sir; the Supreme Court says that.

Mr. EVANS: I will withdraw that question and ask you this: Was that pit completed at the time Mr. Padgett was killed?

Mr. LYLES: We object; that is an indirect way of bringing up the same thing.

The COURT: Was it completed at the time he was killed; that is alleged in the Complaint; he can answer that?

WITNESS: No, sir.

Mr. EVANS:

Q. It was not?

A. No, sir.

Q. Were there any lights in the roundhouse at the time he was killed?

A. No, sir.

Q. Were you there that night acting as conductor of the hostlers; I want you to state to the Court and jury, as far as you can, as far as you know, the movements of Mr. Padgett, as to what you know about it; what time did he come in from Savannah, if you know?

Mr. LYLES: In fairness to the witness, I want to ask the Court to caution him to state only what he knows of his own knowledge.

The COURT: You are to testify to what you know of your own knowledge; not what some one told you.

Mr. EVANS: That is all we want.

Q. About what time did he come in from Savannah?

A. About ten o'clock.

Q. What run did Mr. Padgett have at that time--between what points?

A. Went out on No. 59 and came back on No. 62.

Q. Between what points?

A. Columbia and Savannah.

Q. When did you first see him that night after he came in?

A. I saw Mr. Padgett about 10:30 or something like that; I do not know the minute; just after his engine had come back from Columbia to Cayce, in front of the roundhouse.

14 Q. As I understand you, when he came in from Savannah he had to go to Columbia and then bring his engine back to Cayce?

A. Yes, sir; and bring his engine back to Cayce.

Q. And left his train at Columbia?

A. Yes, sir.

Q. Were you present when a message was delivered to him that night when he came back to Cayce from Columbia?

A. No, sir; I do not remember it.
Q. When did you next see Mr. Padgett that night?
A. It was about 1:15 or 1:30, I can not say which.
Q. Where did you see him and what was he doing?
A. He was coming from what we called the company hotel.
Q. Coming from what is called the company hotel?
A. Yes, sir.
Q. What did he say, if anything, to you?

Mr. LYLES: We object to what Mr. Padgett said, if it is a self-serving declaration.
The COURT: Yes, sir; self-serving declarations can not come in.
Mr. EVANS: I will withdraw that.

Q. Where did he go after you saw him?
A. To the roundhouse, or started that way; I suppose he went there.
Q. Or started that way?
A. Yes, sir.
Q. Where did you next see Mr. Padgett?
A. Coming out of the roundhouse about four o'clock in the morning on an engine, going to the coal chute.
Q. Who was with him?
A. Mr. Halsford, the hostler, was running the engine; he brought the engine out of the roundhouse.
Q. Who else was on the engine with him?
A. I do not know—a helper—a colored man
Q. Do you remember the number of that engine?
A. No, sir; I do not remember the number; it was the engine that went out on 63 in the morning, going North.
Q. You say you saw Mr. Padgett on that engine?
A. Yes, sir.
Q. Where did they take that engine?
A. To the coal chute.
Q. Did Mr. Padgett go to the coal chute with you?
A. Yes, sir.
Q. Was any message delivered to Mr. Padgett by any one that you heard, at the coal chute?
A. You mean so far as the call boy.
Q. Between any of the crew on your train?
A. Yes, sir.

Mr. LYLES: We object to any message delivered by the crew of the train they have got to show that the message was of such a nature as to bind the company before it can come in evidence.
The COURT: Yes, sir.
Mr. EVANS: The way to find out whether it is competent or not is to let it come out, and if it is not competent, rule it out.
Mr. LYLES: Yes, sir, but the dog would be dead.
Mr. EVANS: It would not be dead if the jury were instructed not to regard it.
The COURT: That is the best way to do, unless we send the jury out. Let the jury go out. Retire to your room, gentlemen.

(The jury retired.)

Mr. EVANS: Now, what I want to prove is this: that Mr. Padgett was on engine No. 66 when they went to take it out and went to coal it, for instance, the hostler at the roundhouse took the engine out and in. They coal the engines and water them, and get them in proper condition to go out on their runs. That Mr. Padgett could not get a room that night, after being relieved, could not be accommodated at the hotel, and in order to find a place to sleep, he had to go and sleep in the roundhouse on this engine; that he rode up to the coal chute with this engine; this is a member of that crew, an engineer, that Mr. Padgett asked where his engine
16 was, and he told him where his engine was, and sent him back to it, to go back and see if it had been properly prepared to go out on the run, and I think it is perfectly competent.

Mr. LYLES: Do I understand, then, that you want to prove who it was that told him that?

Mr. Halstead, in the presence of this man.

Mr. LYLES: Was he an engineer?

Mr. EVANS: He was acting as hostler.

Mr. LYLES: We would not be bound by any declarations or instructions given by Mr. Halstead, a hostler in charge of an engine, unless he could show that Mr. Halstead was in some way representing or a representative of the company, so as to authorize him to transmit instructions.

The COURT: I think that is right.

Mr. EVANS: Mr. Halstead is an agent of the company, a servant and agent of the company, at the time that this conversation took place in the line of his duties; so was Mr. Padgett, an engineer in the line of his duties; so was this gentleman here, acting conductor, in the line of his duties, and they were the authorized agents of the company at that time, and under the Federal Employers' Liability act, and would be considered a fellow servant, but the complaint is not restricted to any negligence on the part of a fellow-servant under the federal employers' liability act.

The COURT: This is a question of the admissibility of evidence; the railroad company is bound by its agents, they operate through agents and by what the agents say.

Mr. EVANS: While acting in the scope of their authority.

Mr. TIMMERMAN: It is to this effect: That in order to conduct their business they have what are known as hostlers, and it is the duty of the hostlers to take the engines and put them in shape for their runs; that being the case, to whom could the engineer look for information concerning an engine more readily than to the man whose duty it was to take charge of his engine, and place it;
17 he would not ask the brakeman, because the brakeman would not know. Here is the man whose duty it was to do that, and to know where the engines are.

Mr. LYLES: Of course, a railroad company is bound by the acts of its agents, but they must be within the scope of their authority, and it is not shown, and cannot be shown, that a hostler has any right to direct or control and that would have to be shown; it is

this; we are not responsible for what instructions or advice any hostler gave an engineer, unless it is shown that the hostler was a representative of the company, and authorized to direct and control the movements of the engineers; just the same as if some outside person had instructed Mr. Padgett to do something there are certain well recognized grades of authority, and some have the right to instruct and bind the company, and others have not. This is the plaintiff's case, and he must prove his case and we cannot assume an essential ingredient of his case, unless there be evidence to show it; we cannot assume the plaintiff's case; how, if they say John Jones said something to Mr. Padgett, that would not be competent unless they show that John Jones was an agent authorized to tell Mr. Padgett something, whatever it was he told him.

The COURT: I understand your position.

Mr. TIMMERMAN: Our friend is arguing that we are undertaking to prove that this man directed him; we simply want to prove a matter of information; you take a section hand out here on the railroad he has no authority over an engineer or the conductor; but it certainly would not be held, that it would not be competent, in a proper case to prove that the engineer got information from a section hand that there was a washout ahead.

The COURT: Go on; I am going to admit it.

Mr. LYLES: It is purely hearsay testimony.

18 The COURT: Now, of course, if it is hearsay, it would not be competent.

Mr. TIMMERMAN: He is going to testify about the information he heard the other man give.

The COURT: I am going to hold that that was an agent, and not a third person; bring the jury out.

(The jury returned to their seats.)

Mr. EVANS:

Q. What position did Mr. Ernest Halstead hold?

A. Hostler.

Q. State whether or not he was acting as hostler on this very engine that Mr. Padgett was on?

A. Yes, sir.

Q. State whether or not you were acting as conductor on that engine?

A. No, sir.

Q. What were you doing?

A. I was the conductor on all engines that we took from the roundhouse to Columbia.

Q. That was one of your engines?

A. It was after it left the roundhouse going for water.

Q. Did it leave the roundhouse and go to the coal chute?

A. On its way.

Q. Were you or not in the line of your duty at that time?

A. Yes, sir.

Q. Did Mr. Padgett ride with you up to the coal chute?

A. Yes, sir.

Q. What did Mr. Halsford tell Mr. Padgett in reference to where Mr. Padgett's engine was out at the coal chute?

Mr. LYLES: We repeat the objection we have already made.

The COURT: Yes, sir; sure; note the objection; objection overruled; keep the record straight.

Mr. EVANS:

Q. Tell what Mr. Halsford told Mr. Padgett, in your presence, as to where his engine was?

A. Do you want to know what Mr. Padgett asked Mr. Halsford and his answer?

19 The COURT: Wait a minute.

Mr. EVANS: Our position is this. These hostlers entirely manage the engines while they are around the roundhouse and the coal chute and in the yard; that when an engineer wants to know where his engine is, or information as to where to go to and get it, or see that it has been properly repaired, why it is a part of his duties; to whom shall he go to get the information, except to the hostler, who handles the engine.

Mr. EFIRD: My friend is assuming all of that.

Mr. EVANS: Then, if I do not prove it——

The COURT: I will let you prove what the hostler said to Mr. Padgett.

Mr. EVANS:

Q. State what the hostler said to Mr. Padgett, in answer to some question from Mr. Padgett; what did Mr. Halsford say, what did he tell him with reference to his engine?

A. He told him he would find his engine in No. 3 stall in the roundhouse.

Q. In consequence of that answer what did Mr. Padgett do?

A. Left our engine and went towards the roundhouse.

Q. For his engine?

A. Yes, sir.

Q. Was that the last time you saw him?

A. Yes, sir.

Q. Before you got off duty that morning?

A. Yes, sir.

Q. That was somewhere around four o'clock that morning?

A. Yes, sir.

Mr. LYLES: We must repeat our objection as to leading the witness.

The COURT: He has testified to that; if he has testified to a thing, he can lead him on it.

Mr. EVANS:

Q. Were you present when Mr. Padgett was found in the pit?

A. No, sir.

Q. That engine of Mr. Padgett's was standing where?

A. In No. 3 stall, at the roundhouse.

20 Q. Where would this pit be located with reference to No. 3 stall?

A. The engine was on No. 3, and the pit was on No. 4.

Q. Where would the steps of the engine be with reference to the drop pit—the steps you get up on the engine?

A. Right over the pit.

Q. Right over the pit?

A. Yes, sir.

Q. Were there any lights there that night at all?

A. No, sir.

Q. Were there any in the roundhouse?

A. No, sir.

Q. Had any been installed in the roundhouse?

A. No, sir.

Q. Had that pit been covered up at the time he fell in it?

Mr. LYLES: We object to that.

The COURT: Go on.

Mr. EVANS:

Q. At that time?

A. No, sir.

Q. Was that pit in a proper and safe condition?

Mr. LYLES: We object to that; that is a question of inference.

The COURT: Yes, sir.

Mr. EVANS: I will withdraw that.

The COURT: Let the jury draw their own inferences.

Mr. EVANS:

Q. Were there any signs of danger, or warning signs, put up around that roundhouse at the time of Mr. Padgett's death?

Mr. LYLES: There is no such allegation in the complaint.

The COURT: It is for the jury to determine what ought to have been done; I do not think you can go into that.

Mr. EVANS: I want to ask whether there were any protection signs, or danger signs put up around the pit or any guards?

The COURT: Why?

Mr. LYLES: That is a specific act of negligence and is not alleged.

21 The COURT: I do not think I can admit that. Let him describe the conditions, and let the jury infer what ought to have been done; there is no allegation of that here.

Mr. EVANS: I have got to prove my case.

The COURT: I know that.

Mr. EVANS: Your Honor holds that I cannot prove whether they had any danger signs there. I will read paragraph eight (reads paragraph eight).

The COURT: Go on; I see you have enough here to bring it in; you have it in the complaint that it was not protected.

Mr. EVANS:

Q. Was there any protection, such as guards of any nature, or any danger signs, put up around this pit, or over it, at the time of Mr. Padgett's death?
A. No, sir.
Q. There was not?
A. No, sir.
Q. Now, they have alleged here in their answer that Mr. Padgett had no right in that roundhouse, and was a trespasser; therefore, I think I would have the right to ask him whether he had a right to in and around the roundhouse?

Mr. LYLES: They cannot put that in before we put in our defense.

The COURT: You can bring that in on reply; that is a defense they set up.

Mr. EVANS:

Q. I believe you have stated that Mr. Padgett was killed in about five or six days after you all occupied the roundhouse?
A. Something like that; I do not remember the dates.
Q. Do you recall how many trips Mr. Padgett had made to this roundhouse from Savannah?
A. No, sir.

No cross.

22 CLARA V. PADGETT (white) sworn:

Direct examination by Mr. EVANS:

Q. We have copies of the letters of administration, that the attorneys on the other side have agreed to admit. These were the letters of administration given to you?
A. Yes, sir.
Q. We offer it in evidence?

(Exhibit No. 2, See Appendix.)

Q. Were you the wife of Lewis H. Padgett?
A. Yes, sir.
Q. How old are you?
A. 33 years old.
Q. 33?
A. Yes, sir.
Q. How old was your husband when he was killed?
A. 34.
Q. 34?
A. Yes, sir.
Q. How many children have you?
A. Eight.
Q. You have alleged their names and ages in paragraph five of the complaint; you put the age of Rosa Lee Padgett at 16 years?

A. Yes, sir.
23 Q. And Daisy Padgett at 15 years?
A. Yes, sir.
Q. And Clayton Padgett at 12 years?
A. Yes, sir.
Q. And Ollie Padgett, age 10 years?
A. Yes, sir.
Q. And Nadean Padgett, age 6 years?
A. Yes, sir.
Q. And Ioma Padgett, age 4 years?
A. Yes, sir.
Q. And Theo Padgett, age 3 years?
A. Yes, sir.
Q. Margaret Padgett, age 5 months?
A. Yes, sir.
Q. Will you state whether or not that was the ages of your children at the time your husband was killed?
A. Yes, sir.
Q. You have alleged that this action is brought for the benefit of yourself and your eight children? Is that correct?
A. Yes, sir.
Q. The eight children just mentioned?
A. Yes, sir.
Q. Do you remember the afternoon that Mr. Padgett left home to come to Columbia, and what time he left the house?
A. He left the house about three o'clock.
Q. That was on the 11th of January?
A. Yes, sir.
Q. What was his run, between Columbia and Savannah, if you know?

Mr. LYLES: In fairness to the witness, I think she ought to be cautioned to confine herself to what she knows.
The COURT: Testify to what you know.

Mr. EVANS:

Q. Do you know what train he left there on?
A. He left there on No. 59.
Q. In the afternoon?
A. Yes, sir.
Q. Did you prepare his dinner or supper?
A. Yes, sir; I prepared lunch for him.
Q. What time did he leave Savannah that afternoon?
A. He left home about 3 o'clock.
Q. State whether or not you prepared the supper that he brought with him that night?
A. Yes, sir; I prepared the supper he ate that night.
Q. Do you know what time he got to Columbia?
A. No, sir; I do not know just what time he got there.
24–44 Q. Personally, you do not know how he got killed, except what you have heard?
A. No, sir; nothing at all.

45 E. N. CHISLOMN (white) sworn:

Direct examination by Mr. EVANS:

Q. What is your profession?
A. A civil engineer.
Q. Where do you live?
A. In Columbia.
Q. How long have you been in that business?
A. Fourteen or fifteen years.
Q. Have you had any occasion to make a drawing of this roundhouse and the drop pit at Cayce?
A. Yes, sir; a skeleton drawing showing the plan of the roundhouse and tracks and turn-table and a section of the drop pit.
Q. The drop pit?
A. Yes, sir.
Q. Is that it (indicating)?
A. Yes, sir.
Q. We offer this diagram in evidence.

46 Mr. LYLES: We want to ask a question before you put it in.

Mr. EVANS:

Q. Now, go ahead and explain it to the jury?
A. (Witness explains drawing.) This gives the dimensions of the turn-table; this is the switch track in the roundhouse; this is the turn-table; this shows the different tracks running into the roundhouse; I only put that part where the tracks run into the roundhouse, and show the shape of it; I got the location of the drop pit in the warehouse.
Q. Is that the drop pit?
A. Yes, sir.
Q. What is that there?
A. Track.
Q. What is that there?
A. All of those are tracks.
Q. And this is one and this is one?
A. Yes, sir.
Q. How many tracks do they run in there?
A. Ten tracks.
Q. Which tracks are over the drop pit?
A. I do not know which side you would count from; I counted from this side.
Q. Counting from the left side looking towards Columbia?
A. The drop pit is between numbers two and three; I show the frame of the whole business; where I went into the pit was from this point here.
Q. What is that?
A. A section of the pit, this is the pit as if it were cut in half.
Q. What is the depth of it?
A. Ten feet eight inches from the top of the pit to the bottom.
Q. How wide?

A. Eight feet six inches.
Q. What are those?
A. That is the foundation that supports the two small rails; they have them underneath there, small iron rails.
Q. How much deeper is it from the bottom?
A. From there to the bottom is about four feet and one inch.
Q. How far are those two rails there apart?
A. From the top ... he foundation eight feet six inches.
47 Q. The engines coming into the roundhouse; how are they brought in there?
A. From tracks running on the main line; the table is a turntable that they run around until it hits the tracks you want to put it on, and then the engine is carried into the roundhouse; you come in on the end of those tracks there and turn the table.
Q. How was that pit covered when you made this?

Mr. LYLES: We object.
The COURT: I ruled all of that out, and I rule it out now.

Mr. EVANS:

Q. You made this on the 18th of July?
A. Yes, sir; 18th of July, 1913. I think that was the same day I made the measurements—yes, sir; the same day.

Cross-examination by Mr. LYLES:

Q. Just tell us what is your measurement as to the depth and width of the drop pit?
A. My print is 10 feet 8 inches from the bottom of the pit to the top of the rail.
Q. And what is the width?
A. Between these timbers on each side eight feet six inches.
Q. Does that not take in something other than the pit itself?
A. It takes in some facings.
Q. Would you say that a measurement of seven feet would be correct?
A. No, sir.
Q. You are certain of those measurements?
A. Of course, it was dark in there. That is the best I could do under the conditions.
Q. That is approximate?
A. No, sir; not from the face of those timbers; I do not know about the foundations; there might be a difference in mine and the engineer; this is from the face of the timbers.
Q. Did you go down in the pit?
A. Yes, sir.
Q. How was it down in there?
A. Pretty dark and dirty and greasy.
48 Mr. EVANS: Have you any objection to this going in evidence?
Mr. LYLES: I do not know that we have.
Mr. EVANS: We offer it in evidence.

(Exhibit 4.) See Appendix.

Q. Have you had any experience in construction work?
A. Yes, sir; a good deal of it.
Q. Have you ever had any in building cotton mills?
A. Yes, sir.
Q. Do you know anything about constructing railroad buildings?
A. No, sir; I never had any experience in constructing railroad buildings, only the track work; I have had some in track work, but I never had any in building.
Q. I want to ask you a hypothetical question in regard to a roundhouse.
Mr. LYLES: Before the question is asked: The witness says he is not an experienced man in railway building?
A. I never had any in the construction of buildings; I had it on track work.

Mr. LYLES: This is a building in question here; this is a roundhouse.

Mr. EVANS:

Q. Have you been around working on railroads a good deal?
A. I have been in several railway shops, but not a great deal.
Q. I want to ask you whether or not in a roundhouse like this drawing that you have introduced in evidence here, with a drop pit running under the tracks, as you have explained it, with no lights constructed in it, or over or around the pit, or any other signals of warning that the pit was open, would that be properly constructed and a reasonably safe roundhouse in which railroad employees could safely work?

Mr. LYLES: We object; first, because it is a question for the
49 jury; second, the witness has not qualified as an expert, from his experience, so as to entitle him to give an expert opinion on it; the question of reasonable safe place is for the jury to say; he can say there was a pit with no lights, but if it is a question of expert knowledge, the witness has stated that he has had no experience in railroad construction, and this is railroad construction.
The COURT: I do not think he has qualified as an expert on that.

Mr. EVANS:

Q. Do you know anything about the accident?
A. No, sir; not anything.
Q. You were requested to go and make this drawing?
A. Yes, sir.
Q. This is a correct drawing?
A. I measured it myself; I had my steel tape line; I measured it with a standard steel tape, I believe it is correct.
Q. Did you have your assistant engineer?
A. Yes, sir; I looked at both ends of the tape line and read from both ends of the tape line; I did not leave anything to him; I did it myself.
Q. We have a stipulation with reference to some photographs.

Mr. LYLES: We agree that these are photographs in accordance with our stipulation (reads stipulation).

Mr. EVANS: Here are two of them that he says he will not admit; these two he says he will admit. Were you present when these two photographs were taken?

A. Yes, sir.

Q. By Mr. Blanchard?

A. Yes, sir; I was present.

Q. Look at those two photographs?

A. This is the roundhouse at Cayce; this is the roundhouse here; this is the interior, or a part of the interior.

(Exhibits 5 and 6.)

Q. Were you present when these two photographs were taken by Mr. Blanchard?

A. Yes, sir.

50 Q. Do they correctly represent the roundhouse as it was at that time?

A. That photograph was taken while I was making the measurements of the drop pit.

Q. Is that you down there?

A. Yes, sir; just after this measurement was taken this engine came in.

Mr. LYLES: We object to those two there, because he says they were made afterwards and show subsequent changes in the roundhouse.

The COURT: Are they photographs of the roundhouse at the time of the alleged occurrence?

Mr. EVANS: No, sir; they were taken on the 18th of July.

The COURT: I can not let them go in.

Mr. EVANS: Your Honor will not let these in?

The COURT: No, sir.

Mr. EVANS: We wish them marked for identification.

(Photographs marked for identification.)

HENRY WALLACE, colored, sworn:

Direct examination by Mr. EVANS:

Q. Where do you live?

A. Columbia, S. C.

Q. Were you summoned to come here by both sides, by the railroad and by the plaintiff?

A. Yes, sir.

Q. What were you doing that night?

A. I was call boy that night.

Q. Call boy for the Seaboard?

A. Yes, sir.

Q. At Cayce station?

A. Yes, sir.

Q. State what time did you go to make the calls on the morning of the 12th?

A. I was at the roundhouse at six o'clock.
Q. What time did you leave the yard office?
A. Fifteen minutes to six.
Q. To go where?
A. To the roundhouse.
Q. To do what?
A. To deliver the orders.
Q. To whom?
A. Mr. Garner.
Q. Orders as to what?

51 Mr. LYLES: The orders speak for themselves.
Mr. EVANS: You have got the orders.
Mr. LYLES: We have not got them.

Mr. EVANS:

Q. In consequence of carrying the orders to Mr. Garner, what did Mr. Garner instruct you to do?
Mr. LYLES: We do not know who Mr. Garner is.

Mr. EVANS:

Q. Who was he?
A. The roundhouse foreman.
Q. The roundhouse foreman at Cayce?
A. Yes, sir.
Q. In consequence of you delivering order to Mr. Garner, what did Mr. Garner instruct you to do?
A. To go and look for Mr. Padgett and Tom McDonald.
Q. For what?
A. To call them so they could go out.
Q. Where were they going?
A. To Savannah.
Q. At what time?
A. Seven o'clock, our time.
Q. When you went to carry the orders to Mr. Garner that morning, where was he working?
A. Working on an engine in the roundhouse.
Q. Do you remember on what track?
A. No, sir; I do not remember what track it was on.
Q. Who was working with him?
A. A helper named Henry Ricks.
Q. Henry Ricks?
A. Yes, sir.
Q. About what time was it when he told you to go and call Mr. Padgett and Tom McDonald?
A. About six o'clock.
Q. After he gave you orders to call them what did you do?
A. I looked on the register to see where he had stopped.
Q. Where who had stopped?
A. Mr. Padgett; and I reported he had not registered where he had stopped.
Q. What is that?

A. The register what they sign as to where they can be found so I can find them.

Q. As to what room they were at so you could find them?

A. Yes, sir.

Q. You did not find him?

A. No, sir.

52 Q. What did you do?

A. I reported that he did not register on the book.

Q. In consequence of this, what did Mr. Garner say?

A. He said look around the engine.

Q. On the engines?

A. Yes, sir.

Q. Where were the engines?

A. Some of them were in the roundhouse.

Q. About how many were in there?

A. About seven that night.

Q. About seven there?

A. Yes, sir.

Q. That is, they were standing in these stalls as shown on these photographs—they were standing in there?

A. Yes, sir.

Q. About seven of them?

A. Yes, sir.

Q. Did you look round on the engines?

A. Yes, sir.

Q. Did you find him?

A. No, sir.

Q. What did you do?

A. I went down to the place called the hotel and looked on the register down there and I did not see where he had registered down there.

Q. What did you do then?

A. I asked the clerk down there if he had seen him and he said——

Mr. LYLES: We object.

Mr. EVANS:

Q. You did not find him at the hotel?

A. No, sir.

Q. You looked for him there?

A. Yes, sir.

Q. What did you do then?

A. I went back to the yard office.

Q. What did you do there?

A. I went and looked there.

Q. Looked at the yard office?

A. Yes, sir.

Q. Did you find him?

A. No, sir.

Q. What did you do?

A. I went back to the yard office and reported that I could not find him to Mr. Garner.
Q. Then what happened?
A. He told me to go to the cab track and look in every cab and see if I could find him.
53 Q. What did you do?
A. I went and looked and did not see him over there.
Q. What did you do then?
A. I went back to the roundhouse and met Mr. Garner and he asked me did I find him.
Q. You met Mr. Garner?
A. Yes, sir.
Q. What did you tell him?
A. I told him he was not over there.
Q. What did you and Mr. Garner do then?
A. We went back and looked in the cabs again.
Q. He went with you?
A. Yes, sir.
Q. Did you find him?
A. No, sir.
Q. Where did he go?
A. He told me to go and look in every room at the hotel.
Q. Did you do that?
A. Yes, sir.
Q. Did you find him?
A. No, sir.
Q. Then what did you do?
A. I went back to the roundhouse.
Q. What did you do then?
A. Just as I got to the door I met Mr. Garner and he said——

Mr. LYLES: We object.

Mr. EVANS:

Q. When you came back you met him at the roundhouse door?
A. Yes, sir.
Q. Did Mr. Garner look excited?
A. Yes, sir.
Q. In consequence of that, what did you and Mr. Garner do?
A. Phoned for a doctor.
Q. What did he tell you to do?
A. To get Henry and get him out while he phoned for a doctor.
Q. Out of what?
A. Out of the pit.
Q. Get who out?
A. Mr. Padgett.
Q. That was about what time?
A. That was nearly seven o'clock.
Q. Just before, did you go to his engine and look for him there?
A. Yes, sir.
54 Q. Where was it standing at that time?
A. In the third stall.

Q. At the time of the morning you went to look for him?
A. They had carried it to the coal chute.
Q. Who was on it?
A. Tom McDonald.
Q. And you looked on there for him?
A. Yes, sir.
Q. And he was not there?
A. No, sir.
Q. Did you ask him where he was?
A. I asked Tom if he had seen him.

Mr. LYLES: We object to any conversation.

Mr. EVANS:

Q. Do you remember who first went down in the pit?
A. No, sir; I do not remember who first went down in there.
Q. Do you remember whether it was a negro named Woodward?
A. He went a piece; he went down to the track there.
Q. What did he find?
A. He said he was dead.
Q. You can not tell what he said; who did you find in there?
A. Mr. Padgett.
Q. Did they bother him at that time?
A. No, sir.
Q. Left him there until when?
A. Until Mr. Garner came back.
Q. Before you went to look for Mr. Padgett that morning, who did you go to look for?
A. Tom McDonald.
Q. Who was he?
A. Mr. Padgett's fireman.
Q. Where did you go to look for him?
A. At the roundhouse.
Q. Where did you find him?
A. I found him lying down in the place called the boiler room.
Q. Found him lying down in the place called the boiler room?
A. Yes, sir.
Q. Did you call him?
A. Yes, sir.
Q. That was about what time.
A. That was about 6:15.

55 Q. When you first went to the roundhouse that morning to take orders and call Mr. Padgett and Tom McDonald, did you see Mr. Padgett's engine?
A. Yes, sir.
Q. Where was it standing?
A. In the roundhouse.
Q. Where?
A. In the third stall.
Q. In the third stall?
A. Yes, sir.
Q. Was that right over this drop pit?

A. Yes, sir.
Q. And that is where it was when you first saw it, when you went there to call them?
A. Yes, sir.
Q. And the next time you saw it was when?
A. About seven o'clock.
Q. It was at the coal chute?
A. Yes, sir.
Q. And Tom McDonald was on it?
A. Yes, sir.
Q. That is correct?
A. Yes, sir.
Q. Where was the step of the engine standing with reference to the pit?
A. It was just over the pit.
Q. That is, the step of the engine was standing over the pit?
A. Yes, sir.
Q. Do you remember what hostler took Mr. Padgett's engine out that morning?
A. No, sir.
Q. You were looking for Mr. Padgett?
A. Yes, sir.
Q. What was the condition of the pit that night, was it open or covered?
A. It was open.
Q. Were there any signal boards or anything around there to keep you from falling in it?
A. No, sir.
Q. Were there any lights in there?
A. No, sir.
Q. None around the pit?
A. No, sir.
Q. And none around the roundhouse?
A. No, sir.
Q. Was this roundhouse finished?
A. I do not know; all I can say there was no lights there.
Q. Did you see any one after that working on the roundhouse?
A. No, sir; not that night.
Q. You say that pit was not covered that night?
A. No, sir.
56 Q. And there had been no lights in the roundhouse?
A. No, sir.
Q. Until from the time you went there until Mr. Padgett got killed?
A. No, sir.

Cross-examination by Mr. LYLES:

Q. How long were you on duty that night?
A. All night.
Q. What time did you go on duty?
A. Seven o'clock at night.

Q. And you stayed on duty until daylight the next morning?
A. Till seven o'clock.
Q. You were the call boy to call all the engineers?
A. Yes, sir.
Q. Mr. Padgett came in from Savannah on No. 62?
A. Yes, sir.
Q. And his regular run was to go out on No. 59?
A. Yes, sir.
Q. You say you were the call boy; did you call the engineers for every train?
A. Yes, sir.
Q. Did you call Mr. Radford that night?
A. I do not remember.
Q. Was it not about fifteen minutes to six, railroad time, when you went to call Mr. Padgett?
A. It was 5:45, our time.
Q. That would be fifteen minutes to six, railroad time?
A. Yes, sir.
Q. And that is the time you were first sent to call Mr. Padgett?
A. Yes, sir.
Q. You were calling him to go out on No. 59?
A. Yes, sir.
Q. That was his regular run, was it not?
A. Yes, sir.
Q. Will you give us the numbers of the engines that were in the roundhouse that night?
A. I cannot remember now what the numbers were.
57 Q. Of course, you cannot remember whether Mr. Padgett's engine was in there?
A. Yes, sir; I remember that was in there.
Q. Why do you remember it?
A. I went on the engine and looked for him.
Q. Did he have his name written on it?
A. No, sir.
Q. Do you not know that no engineer has no particular engine?
A. He had been running 35; I do not remember whether it was 35 or 62.
Q. And you do not remember which was the one you saw in the house, whether it was 35 or 62?
A. No, sir.
Q. And you think the engine you saw in there was Mr. Padgett's engine?
A. For I went on it to look for him.
Q. Mr. Padgett had not registered where he could be found?
A. No, sir.
Q. He had not written his address by his name?
A. No, sir.
Q. Mr. Padgett had written his name but he had not written his address?
A. Yes, sir.

Q. You said you looked on that engine in the roundhouse for him?
A. Yes, sir.
Q. And you say you found Tom McDonald sleeping in the boiler room?
A. Yes, sir.

Mr. EVANS:

Q. Do you know the engine Mr. Padgett usually run on?
A. Yes, sir.
Q. And you have stated it was either 35 or 67?
A. Yes, sir.
Q. One or the other?
A. Yes, sir.
Q. Either 35 or 67?
A. Yes, sir.
Q. You had seen him on his engine before?
A. Yes, sir.
Q. An engineer usually has his engine?

Mr. LYLES: We object.

Q. You do not remember which Mr. Padgett's engine was, 35 or 67?
A. No, sir.
58 Q. You do know that Mr. Padgett had been running 67?
A. I was calling him to go on 35, too.
Q. But Mr. Padgett had not been running engine 35 for any length of time?
A. I do not know how long he had been running it.
Q. All you know engine 35 was to go on train 59?
A. Yes, sir.
Q. No engineer has any particular engine has he; they put any engine they want to on a train?
A. I do not know about that.
Q. You do not know how many trips Mr. Padgett had made with 35?
A. No, sir.
Q. Or with 67?
A. No, sir.
Q. And you do not know which one of those engines is the engine in question?
A. No, sir.
Q. You know that engine 35 was to take out train 59 that morning?
A. Yes, sir.

Mr. EVANS:

Q. Does not the orders you gave to Mr. Garner, the roundhouse foreman, show what engine was to go out, and what engineer and what fireman was to go on that engine?

Mr. LYLES: The orders are the best evidence.

The COURT: Yes, sir.
Mr. LYLES: We have no notice to produce them.
Mr. EVANS: Plenty of opportunity but no notice.
The COURT: It is now time for the recess for dinner. Gentlemen of the jury, do not talk with anyone about this case; and do not let anyone ap-roach you about it; if this is done, you come and report it to me. Be in your seats at three o'clock. Take a recess until three o'clock.

3:00 P. M., February 10, 1914.

WILLIE RIGGS (colored) sworn.

Direct examination by Mr. EVANS:

Q. How old are you?
A. 24 years old.
59 Q. What are you doing now?
A. Working for the Southern Railway.
Q. In what capacity?
A. In the roundhouse at Columbia.
Q. What kind of a position have you?
A. Machinist's helper.
Q. Machinist's helper?
A. Yes, sir.
Q. Who is the machinist you help?
A. Mr. McElhaney.
Q. How long have you held that position?
A. I will be there four months the 27th of this month.
Q. In January, 1913, where were you working?
A. For the Seaboard.
Q. Where?
A. Columbia.
Q. Columbia?
A. Yes, sir.
Q. Was it in Columbia, or where?
A. It was not in Columbia, it was over at Cayce.
Q. Where is Cayce, on the other side of the river from Columbia, *on* this side?
A. On the other side of the river.
Q. You are certain of that?
A. Yes, sir: it is on the other side of the river from Columbia.
Q. From Columbia?
A. Yes, sir.
Q. I think you are correct about that?
A. Yes, sir.
Q. It is on the other side of the river from Columbia?
A. Yes, sir.
Q. On which side of the river is it from where you are now—this side or the other side?
A. This side.
Q. Where is the roundhouse of the Seaboard located?

A. Over there at Cayce.
Q. And that is where you were working in January, 1913?
A. Yes, sir.
Q. What position did you hold there at that time?
A. Hostler's helper.
Q. Who was your hostler?
A. Mr. Ernest Horsford.
Q. You were his helper?
A. Yes, sir.
60 Q. What were your duties at that time?
A. I had to throw the switches and coal up the engines and go with him.
Q. Turn the switches, coal the engines, and go with him?
A. Yes, sir.
Q. Did you have to water them also?
A. Yes, sir.
Q. Were you on duty on Saturday night the 11th of January and until Sunday morning the 12th of January?
A. Yes, sir.
Q. Who were you assisting at that time?
A. Mr. Ernest Horsford.
Q. What were your duties on that night?
A. We were bringing engines to town after water most of the time.
Q. What else?
A. And then take the engines in the roundhouse after we got through working, worked them and brought them out and set them out for the engineers.
Q. And your duties were to take the engines in the roundhouse and also to take them out and get them in proper condition to go out, you mean by that to coal and water them?
A. Yes, sir.
Q. When you took them out of the roundhouse to what point did you take them?
A. We took them out there and coaled them up and watered them and set them out.
Q. Look at this picture and see if this is where you run them into the roundhouse?
A. Yes, sir; that is the place.
Q. You took them in and out of that place?
A. Yes, sir.
Q. And set them out where?
A. Set them up and down there from the coal chute.
Q. For what purpose?
A. For the engineers and firemen.
Q. The engineers and firemen who did what?
A. They had to go out on the runs.
Q. They had to go out on the runs?
A. Yes, sir.
Q. Do you remember which one of these things, what do you call those things there?

A. Stalls.
61 Q. Stalls?
A. Yes, sir.
Q. After this passes from the tracks here into these posts here you call them stalls?
A. Yes, sir.
Q. That is after they pass over the tracks on the outside and get beyond these posts you call them stalls?
A. Yes, sir.
Q. On which one of those stalls was Mr. Lewis H. Padgett's engine standing?
A. In the third stall.
Q. In the third stall?
A. Yes, sir.
Q. That was over or near this drop pit?
A. It was right over the drop pit.
Q. Right over the drop pit?
A. Yes, sir.
Q. Who took Mr. Padgett's engine on the morning of the 12th, who took Mr. Padgett's engine out of that stall and carried it out and watered it and coaled it?
A. Mr. Ernest and the conductor and me.
Q. Him and the conductor and you?
A. Yes, sir.
Q. You mean Mr. Cline?
A. Yes, sir.
Q. The man that was on the stand this morning?
A. Yes, sir.
Q. You are the ones that took it out and coaled it and watered it?
A. Yes, sir.
Q. And got it ready to make his run?
A. Yes, sir.
Q. It was in stall No. 3?
A. Yes, sir.
Q. Which was right over or near the drop pit?
A. Right over the drop pit.
Q. Were there any lights in the roundhouse?
A. No, sir.
Q. Was that drop pit covered?
A. No, sir.
Q. Neither one?
A. No, sir.
Q. Had there been any lights around it or over this pit?
A. No, sir.
Q. Or had the drop pit been covered?
A. It was not covered.
Q. From the time you all had been ordered in there; from
62 the time all of you employees had been ordered in there to use this roundhouse until the time Mr. Padgett was killed?
A. No, sir.
Q. There was not any?

A. No, sir.
Q. Had you been given any orders by anyone?

Mr. LYLES: We object; I do not know what orders he is talking about; and in the second place the orders are the best evidence.
The COURT: Go on.

Mr. EVANS:

Q. Had you been given any orders by anyone?
A. Yes, sir.
Q. What were they?

Mr. LYLES: We object.

Mr. EVANS:

Q. I will withdraw that question, and ask you this: Were there any signals or any signs or any guard rails or any signboards or anything else around this pit that it was dangerous?
A. No, sir.
Q. Until the time Mr. Padgett had been killed?
A. No, sir.
Q. I will ask you this: From the time you employees first entered that roundhouse on the 5th of January, on Sunday, and up until the time that Mr. Padgett was killed, that you all had been given any orders that was dangerous in there, and to be careful, or anything?

Mr. LYLES: We object; it is irrelevant.
Mr. EVANS: I will withdraw it.

Q. Had there been any lights placed in this roundhouse from the time you all began to occupy it until the time that Mr. Padgett was killed?
A. No, sir.
Q. Had this pit been covered at all?
A. No, sir.
Q. Were you on the engine the morning you and Mr. Ernest Horsford found Mr. Padgett asleep on one of the engines in the roundhouse?
A. Yes, sir.
Q. What were you going to do with it that morning?
A. We were taking sixty-six's engine out to work it.
Q. For what purpose?
A. To go out on the run.
63 Q. Was that before you took Mr. Padgett's engine out?
A. It was before we took that out.
Q. It was before you took his out?
A. Yes, sir.
Q. Who did you find on that engine asleep at that time?
A. Mr. Padgett.
Q. Where did he ride with you and Horsford and Cline?
A. Down to the coal chute.
Q. In answer to a question from Mr. Padgett to Mr. Horsford

where did Mr. Horsford tell Mr. Padgett as to where his engine was?

Mr. LYLES: We object to that; that is the same question we had up this morning; we do not care what Mr. Horsford told Mr. Padgett, as it is not binding on us, unless Mr. Horsford was one in authority.

The COURT: I ruled on that this morning.

Mr. EVANS: I will withdraw that question for the time being.

Q. Who was Mr. Ernest Horsford, what was his position?
A. Handling engines, like the engineers handle them.
Q. He was the hostler?
A. Yes, sir.
Q. His duties were to do what?
A. To take the engines out and work them.
Q. For what purpose?
A. To put them out on the line for the engineers.
Q. For the engineers?
A. Yes, sir.
Q. In answer to a question from Mr. Padgett, what did Mr. Ernest Horsford, the hostler, tell him as to where his engine was?

Mr. LYLES: We repeat our objection on the ground that it is not shown that Mr. Horsford was authorized to bind the company; there is no evidence of his authority to bind the company.

The COURT: Go ahead; note the exception.

64 Mr. EVANS:

Q. What did Mr. Ernest Horsford tell Mr. Padgett?
A. He told him it was in the third stall.
Q. Where?
A. In the roundhouse.
Q. In answer to that where did Mr. Padgett go?
A. He went to his engine; he said he was going to see——

Mr. LYLES: We object.

Mr. EVANS:

Q. For what purpose did he go there?
A. To see if his engine was worked.

Mr. LYLES: We are objecting, your honor.

The COURT: He is not saying anything.

Mr. EVANS:

Q. What did he go up there to do?
A. To see whether his boxes were packed on his engine.
Q. To see whether his boxes were packed on his engine?
A. Yes, sir.
Q. That is what he went up there for?
A. Yes, sir.
Q. And his engine was standing on No. 3?
A. Yes, sir.

Q. Over the pit in the roundhouse?
A. Yes, sir.
Q. And that was what time in the morning?
A. That was about 4:00 o'clock, or after four o'clock.
Q. Do you remember what the number of that engine was,—or tell what the number was that he was to take?
A. I cannot exactly remember the number of the engine; it was 35 or 67 one.
Q. Either 35 or 67?
A. Yes, sir.
Q. What engine had Mr. Padgett been running before that?
A. He had had 35.
Q. And he had been running 67?
A. Yes, sir.

Mr. LYLES: We object to counsel leading him.
The COURT: Do not lead him, Mr. Evans.

Mr. EVANS:

65 Q. When did you find out that Mr. Padgett had been killed?
A. I did not know anything about it until we had gone over town that morning and fixing to go home.
Q. You did not know anything about it until you got to town?
A. No, sir.
Q. Until you got to town the next morning?
A. No, sir.
Q. For what purpose did you go to town?
A. We had knocked off and come over on the engine.
Q. And come over on Mr. Padgett's engine?
A. Yes, sir.
Q. Who brought it over?
A. I do not know.
Q. And you heard it after you got into Columbia?
A. Yes, sir.
Q. That was about what time?
A. About 6:30.
Q. It might have been later?
A. Yes, sir; it might have been later than that.
Q. And you went over to Columbia on Mr. Padgett's engine that he was to take out?
A. Yes, sir.
Q. Why did that engine go to Columbia?
A. Went over there to get the train.
Q. Where was he to take that train?
A. To Savannah.
Q. Back to Savannah?
A. Yes, sir.
Q. That was the one that Mr. Padgett was to get if he had been living and take it back to Savannah?
A. Yes, sir.

Q. Is there anything else you know about this case that would throw any light on it?
A. No, sir; I do not know anything else about it at all.
Q. You are now working for the Southern Railway Company?
A. Yes, sir.
Q. And have been there about four months?
A. I will be the 27th of this month.
Q. You are a machinist's helper over there?
A. Yes, sir.
Q. Who was Mr. Garner's machinist helper over at Cayce at the time Mr. Padgett was killed?
A. Henry Ricks.
Q. What relation is he to you?
A. My uncle.
66 Q. Do you know whether he is here or not?
A. He is not here.
Q. He was machinist's helper to Mr. Garner in the roundhouse the night this accident happened?
A. Yes, sir.
Q. And at that time you were helper or fireman, as you call it, to Mr. Ernest Horsford, who was one of the hostlers?
A. Yes, sir.
Q. Who was the other hostler that night?
A. Mr. Aldridge.
Q. Do you know who his helper was?
A. Sidney Brevard.
Q. Is he here?
A. No, sir.
Q. Have you seen him since you have been here?
A. No, sir; he was in Savannah, Georgia, the last time I heard of him.
Q. Mr. Aldrige, is he here?
A. Yes, sir.
Q. Were those all of the hostlers that were at Cayce to manage and take in and out the engines at that particular time?
A. Yes, sir.

Cross-examination by Mr. LYLES:

Q. You found Mr. Padgett asleep on the engine that was to go out on 66?
A. I found him asleep; he was on the engine when we got to the coal chute.
Q. And that engine went on 66?
A. Yes, sir.
Q. And 66 left Cayce at what time?
A. I do not know exactly what time.
Q. About what time in the morning? It was about four o'clock when you took the engine out?
A. Yes, sir.
Q. And 66; you are talking about the number of the train?
A. Columbia time.

Q. And 66 was due to leave there at 5:40?
A. I do not know.
67 Q. That would make it about right if you were working the engine about an hour and a half before it went out?
A. Yes, sir.
Q. When you got that engine that went out on 66 out of the roundhouse *that* Mr. Padgett was on that engine?
A. Yes, sir.
Q. And he rode as far as the coal chute?
A. He was there when I got out to put up the chain at the coal chute.
Q. And that is where Mr. Padgett got off the engine?
A. Yes, sir.
Q. And it was still dark?
A. Yes, sir.
Q. That was in January and at four o'clock; was it dark?
A. Yes, sir.
Q. And you could not see him when he walked off, after he got off a little piece?
A. I did not notice him much.
Q. As a matter of fact don't you know yourself that you did not see where Mr. Padgett went?
A. He went back towards the roundhouse.
Q. You did not see him go in the roundhouse?
A. No, sir.
Q. You could not see that far, could you?
A. No, sir.
Q. And you do not know why Mr. Padgett went in the roundhouse except from what some one said?
A. I heard him say that.
Q. And your idea as — what he went in there for is what he said?
A. He was not telling me anything; what he was telling Mr. Horsford.
Q. You did not see Mr. Padgett living any more after he left you at the engine?
A. Not from that time until this.
Q. You have not seen him alive from that time until this?
A. No, sir.
Q. Your idea is confined as to what you heard Mr. Padgett say he was going to do?
A. Yes, sir.
Q. The engine that was in stall No. 3, you are not certain what that number was?
A. No, sir.
68 Q. Do you know whether it was 35 or 67?
A. No, sir.
Q. It may have been 35 or 67?
A. Yes, sir.
Q. And you do not know what engine Mr. Padgett came in from Savannah on?
A. Yes, sir.

Q. What engine was it?
A. No. 35.
Q. You cannot swear that it was No. 35 in stall No. 3?
A. No, sir; I would not swear that, but it was 67 or 35.
Q. And that is the engine that Mr. Horsford told Mr. Padgett about?
A. Yes, sir.

Mr. LYLES: Now, as to the witness's statement admitted over my objection as to what Mr. Padgett was going to do, it appears that it was founded on hearsay and the declarations of Mr. Padgett; that he could not see Mr. Padgett, and did not know of his own knowledge where he went, and that statement has become irrelevant and incompetent, and I ask that it be stricken out, because the witness himself has admitted that he could not see Mr. Padgett, and did not see him again alive, and it is founded on what Mr. Padgett said he was going to do, and is a self-serving declaration, and is not admissible.

Mr. TIMMERMAN: There is no objection to that, provided our friend's examination stays in; he can not strike his examination out.

Mr. LYLES: I examined the witness for the purpose of finding out the admissibility of his statement, and, of course, the testimony goes out. Your Honor will see that I objected at the time this came out, and your Honor said he was not saying what Mr. Padgett said; and I undertook to make any objection at the same time when the witness undertook to say something that a man said, and subsequently, on cross-examination, it appears that his statement was not founded on his own knowledge, but founded on certain self-serving declarations of a man that stands in the boots of this plaintiff.

69 Mr. TIMMERMAN: That can not be a self-serving declaration; there was no issue joined and no issue between any of the parties at all; this man was simply going about his duties; it is not a self-serving declaration in view of all the facts developed in this case, no more than to say I am going down the street and they dug a pitfall for me; it is not a self-serving declaration; it has no reference to it at all; it was just an occurrence happening before the accident and throws light on it; of course, if Mr. Padgett had been injured and got up and said so and so happened, and some one knocked him down or pushed him down in there or something it would be a self-serving declaration, but there is no side to it; it is purely an instance that we are trying to bring out; it shows the situation of these parties and the location of them and what they were doing.

The COURT: Strike it out.

Mr. EFIRD: That carries with it also the statement of this witness that he went there to see if his boxes were packed; Mr. Evans brought that out and he said it on direct examination, that Mr. Padgett went to see if his engine was packed, and that goes out, because he could not know what his purpose was, unless he heard Mr. Padgett say so; he never saw him go in there and did not know what he did, and all of that goes out under your Honor's ruling?

The COURT: Let all of that go out.

Mr. EVANS: Your Honor rules that out about him going to see about his boxes?

The COURT: Yes, sir; I ruled that out.

Mr. EVANS:

Q. How long have you been a hostler's helper or connected around railroads running engines?

A. I was a hostler's helper over there about three or four months.

Q. How long in all of your life have you been in that position?

A. About four years in all.

Q. About four years in all?

A. Yes, sir.

70 Q. State whether or not it is the duty of an engineer when he comes into the roundhouse or to a station where there is a roundhouse, with repairs to be made on his engine; state whether or not it is his duty, before the engine is taken out of the roundhouse, to see that it has been properly repaired before it is taken out, to see that the proper repairs have been made?

Mr. LYLES: We object; because this man has not qualified as an expert on engineers; he was a hostler's helper and has never been an engineer or engineer with the Seaboard; and how is he to know the rules, how is he in a position to know the rules of the Seaboard engineers, when he has never been one; he was nothing but a hostler's helper; whose duties are distinct and separate from those of an engineer or fireman; that classification is absolutely distinct, and he can only answer the question, not of his own experience and knowledge, but from hearsay.

Mr. EVANS: That is only a surmise on the part of my friend when he says he can only answer from hearsay; a man that has been a fireman, a hostler's helper, a hostler's helper means nothing less than a fireman, an assistant to the engineer, who has control over all the engines, and knows his duties from the rule book, that a hostler acts as engineer in preparing those engines, to water and coal them, and take them out of the roundhouse to a certain place for the engineers to go out on their runs, and there is a further rule in their rule book.

Mr. LYLES: We object to counsel stating that.

The COURT: Can't this witness testify that he worked around yards, and sees what a hostler does, fires the engines, and so on; go on, I am going to let him answer the question.

Mr. EFIRD: He is talking about an engineer.

Mr. EVANS: A hostler is an engineer that takes the engines in and out of the roundhouse.

71 The COURT: I know what a hostler is.

Mr. EVANS: And he is an engineer of the same type and character as the others, except that his sphere is limited betwe-n certain points and other engineers, for instance, like Mr. Padgett. They would take the engines and run them from Cayce to Columbia and back.

Mr. EFIRD: We object to him making that statement.

The COURT: I want to hear what they are saying.

Mr. EVANS: I have the right to make an argument to your Honor

The COURT: Go on and answer the question; note the exception.

Mr. EVANS:

Q. Let the stenographer read it? (Stenographer reads: "State whether or not it is the duty of an engineer when he comes into the roundhouse or to a station where there is a roundhouse, with repairs to be made on his engine; state whether or not it is his duty, before the engine is taken out of the roundhouse, to see that it has been properly repaired before it is taken out, to see that proper repairs have been made?")

Mr. LYLES: That question is not applicable to the situation here, because there is no issue that repairs had been made on that engine.

The COURT: Go on.

Mr. EVANS:

Q. Now, answer the question that the stenographer read. That it was his duty to see to that before he carried it out?

A. Before the engineers go out they go to the engine on that line and see if everything is all right, or else have it worked over again, and we have done that over there, they have made us work it over again.

Q. And that was before it was carried out on the run?

A. Yes, sir.

Q. And makes you work overtime?

A. Yes, sir.

Mr. LYLES:

Q. While you were at Cayce you were a hostler's helper?

A. Yes, sir.

72 Q. And it was the duty of you and Mr. Horsford to take care of the engineers' engines?

A. To work them and put them in shape.

Q. When the engineer came in he left his engine on the hostler's track or the cinder pit track at Cayce?

A. Yes, sir.

Q. And he left it somewhere between the yardmaster's office and the roundhouse?

A. Yes, sir, they would bring it near the roundhouse.

Q. But the cinder pit track and the hostler's track are outside of the roundhouse?

A. Yes, sir.

Q. They would put their engines there when they would come in off their runs?

A. Yes, sir.

Q. When Mr. Padgett came in from Columbia he took his train on to Columbia and brought his engine back to Cayce?

A. Yes, sir.

Q. And he would run it on the cinder pit track or the hostler's track?

A. He more or less slept on his engine.

Q. And then it was your duty to fix that engine up and then you

would take the engine and put it back after you finished working on it, then you would take it back and put it on the hostler's track or the cinder pit track, and clear the main line?

A. We would not put it on either one of those tracks.

Q. Where would you put it?

A. Brought it to the coal chute and set it on one of those tracks down there.

Q. On that track down at the coal chute?

A. Yes, sir.

Q. You would take the engine out of the roundhouse?

A. Yes, sir.

Q. And that is where the engineer would come for his engine?

A. Yes, sir; when it was a passenger engine.

Q. And he would oil his engine and inspect it there, would he not?

A. Yes, sir.

Q. It was your business to fix the engine up and the work the engineer wanted done?

73 A. Coal it and water it, and if it was not right he would have it worked over again.

Q. He had to pass on it?

A. Yes, sir.

Q. That was your business when you finished with an engine to put it on the track near the coal chute, and after you finished working them they were ready to go out on the run?

A. Yes, sir.

Q. And you would put it on that track?

A. Yes, sir.

Q. And the engineer would come and look at it?

A. Yes, sir, when his engine was there he would.

Q. The engineer would not inspect his engine until you got through working on it?

A. He would inspect it when he came in on his engine; he would inspect it when he came in.

Q. And left it near the roundhouse?

A. Yes, sir.

Q. That is outside of the roundhouse?

A. Yes, sir.

Q. And you would work over the engine?

A. Yes, sir.

Q. And if you had anything to do on the engine that required it you would put it in the roundhouse, you would put it in there?

A. Yes, sir.

Q. And when you got it ready to go out on the run you would take it out and work it and put it on the coal chute track?

A. Yes, sir.

Q. And it was after you had finished the engine for the road that the engineer would come?

A. After he was called he would come.

Q. An engineer has nothing to do with his engine until he is called?

A. No, sir.

Q. After an engineer came over to Cayce he got off his engine and inspected it and it was turned over to you and the hostler and the engineer had nothing more to do with it until he was ready to go out?

A. Until they called him.

Q. There was no reason for an engineer to go into the roundhouse to inspect his engine?

Mr. EVANS: I just want to call my friend's attention to the fact that he is testifying and not the witness.

74 The COURT: Go on.

Mr. EVANS: I am not objecting.

The COURT: Go on.

Mr. LYLES:

Q. Do you know what his run was, he had been running 62 and 59?

A. Yes, sir.

Q. And to fix up that engine when it was ready to go out on 59 you would leave it on that track?

A. Yes, sir; we would take it out of the house and work it.

Q. After you finished working it you would leave it down there for him on the coal chute track?

A. Yes, sir.

Mr. EVANS:

Q. Your hostler, and yourself, the one that assisted you when an engine comes in there and there is something to be done to it you take it into the roundhouse?

A. Yes, sir; put them in the roundhouse.

Q. And the machinists in the roundhouse do the repairing?

Mr. LYLES: We object to that; we can lead him all we please, but on direct examination he cannot.

The COURT: I have warned him not to lead him. Do not lead him, Mr. Evans.

Mr. LYLES: I object further to this line of testimony, because the question is as to a particular engine, and it is not the question as to what they might or might not have done.

The COURT: Let's get down to concrete facts.

Mr. EVANS: That is what I have tried to do all the while, your Honor. Our friend here would have hostlers and hostlers' helpers repairing engines, and which we all know is not correct.

The COURT: Do not make your speech now; examine the witness.

Mr. EVANS:

Q. When an engine came in and it was put out here in the yard, you and the hostler did what?

A. Worked it and put it in the house.

Q. Worked it and put it in the house?

A. Yes, sir.

75 Q. If there was anything to do on it, who did that?

A. The machinist and his helper.

Q. And not you and Mr. Horsford?

A. No, sir; we did not do anything like that.

Q. If an engine was taken out not properly prepared, what was the consequences?

A. Had to work it over.

Q. Had to work it over?

A. Yes, sir.

Q. And that being true, did not the engineers attempt to see that their engines were properly prepared before they left the roundhouse?

Mr. LYLES: That does not fit this case, because there is no evidence that there were any repairs to be made on Mr. Padgett's engine.

The COURT: The allegation here is that he fell into the pit; there is nothing here about repairs on the engine; here in paragraph eight is all the specifications of negligence.

Mr. TIMMERMAN: The witness has testified that if there was any work to be done by the machinists that it was carried into the roundhouse and put in that house; and it has been testified that this particular engine was in the roundhouse and next to this pit; therefore, there is some evidence that *puts* engine was there on that occasion for the purpose of being repaired.

The COURT: It is in here; go on; go right on.

Mr. EVANS: I will ask the stenographer to read the question. (Stenographer reads:) "And that being true, did not the engineers attempt to see that their engines were properly prepared before they left the roundhouse?")

A. Yes, sir.

Mr. LYLES: That is purely speculative, as the party is not conversant with the duties of an engineer, and this witness has admitted that he did not know what Mr. Padgett did when he went into the roundhouse, and it is speculative.

The COURT: Do you know what he did when he went in the roundhouse?

76 WITNESS: No, sir.

Mr. EVANS: He said this: he said that when he left them at their engine at the coal chute, which is 75 yards away, that from a certain conversation that he went to his engine to see if it had been properly repaired, and the reason he knew it was standing over the pit, why it had to be repaired.

Mr. LYLES: And your Honor struck out what he thought he was going to do.

Mr. EVANS: I remember your Honor struck out what he said he was going to do.

The COURT: All of that is out.

Mr. EVANS:

Q. When you and the hostler, you and the two hostlers, or assist-

ant helper as you were, and that is you mean you were the fireman on the engine?

A. Yes, sir.

Q. And watered and coaled it?

A. Yes, sir.

Q. When you all got one of those engines out of the roundhouse and it was not properly prepared, what does the engineer that is going to take that engine out make you do?

Mr. LYLES: That is a repetition of the same thing, trying to prove by speculation as to what Mr. Padgett did; the question is, what he did on that night, and the witness has said he did not know; and he has never said the engine was repaired; and there is no testimony that the engine was repaired; he said he did not know which engine it was, that it was 67 or 35.

Mr. EVANS: I will withdraw it.

The COURT: I have ruled on that.

ERNEST HORSFORD (white) sworn.

Direct examination by Mr. EVANS:

Q. How old are you now?

A. 24.

Q. Where do you live?

A. In Columbia.

Q. Who are you working for?

A. For the Seaboard.

77 Q. In what capacity?

A. Hostler.

Q. Is that the same capacity in which you were working when Mr. Padgett was killed?

A. Yes, sir.

Q. Were you on duty that night?

A. Yes, sir.

Q. You were on duty the night that Mr. Padgett was killed?

A. Yes, sir.

Q. In the capacity of hostler?

A. Yes, sir.

Q. Who was your assistant?

A. Willie Ricks.

Q. Who was the machinist at the time?

A. Mr. Garner.

Q. What position did he occupy?

A. Machinist and roundhouse foreman.

Q. Who was his assistant?

A. Henry Ricks.

Q. Who else was on duty beside you?

A. Marvin Aldridge, he was a hostler, and a good many negroes around there for the boilers and so on.

Q. You and Mr. Aldridge were the only two white hostlers on duty at that time?

A. Yes, sir.

Q. And you had your assistants?
A. Yes, sir.
Q. I would like for you to tell the Court and jury exactly, of your own knowledge, as best you can, what you know about Mr. Padgett coming from Savannah on his run, and what you saw of him that night? What you know of him being over there that night, and what happened?
A. When Mr. Padgett first came in, he was due at Columbia at ten o'clock, and the roundhouse foreman told us to go and tell him to come back over there that he might run him back on 43; he came back as soon as he come and came back to the roundhouse and came back to the yard office, and I saw him about twelve o'clock, or something like that, after 43 had gone, and he told me he could not get a bed——
Q. Cut that out; you state you saw him, and tell what he did, so far as you know, and what happened?
A. He went to the roundhouse and went to sleep on an engine in there, and I woke him up about 4:30 and he asked me——
78 Q. You cannot tell that; but in consequence of what he did ask, tell what he did?
A. He went back to the roundhouse, and went towards the roundhouse, it was dark and I could not see him.
Q. How far were you from the roundhouse?
A. 50 or 75 yards.
Q. You were at the coal chute?
A. Yes, sir; and I never saw him any more then, and I have never seen him since.
Q. Why had Mr. Padgett not been relieved from duty that night?
A. The Limited Train was not on time; they did not expect it to get to Columbia on time for the Limited's man to go back on his train; they were running Mr. Radford on the Limited.

Mr. LYLES: The witness should not testify to anything except what he knows of his own knowledge.
WITNESS: That is of my own knowledge.
The COURT: You testify what you know.
WITNESS: That is what I know.

Mr. EVANS:

Q. Go ahead?
A. And when the Limited came in and he did not have to go on it and he went on his regular run; and Mr. Padgett could not get a bed at the hotel and he went to the roundhouse and went to sleep and I woke him up about four or four-thirty o'clock, and he was down at the coal chute, and I was down there at the coal chute getting coal for 66.
Q. And when you woke him up what happened?
A. He went back towards the roundhouse.
Q. What caused him to go back?
A. His main driving box was hot.

Mr. LYLES: We object to any testimony as to what caused him to go back; he said he did not know where he went.

The COURT: He said he went back the last time he saw him.

Mr. LYLES: He said he did not know whether he went to the roundhouse or not.

79 The COURT: Testify to what you know.

WITNESS: It was dark and I could not see him; I know what he told me.

Mr. LYLES: That is not admissible.

The COURT: You cannot tell that.

Mr. EVANS:

Q. From what you knew about his engine why was he going back there?

The COURT: You cannot do that.

Mr. EVANS:

Q. Do you know what was the matter with his engine that night?

A. The boxes were hot.

Q. What had to be done with them?

A. They had to be packed.

Q. State whether or not it was the engineer's duty to see whether it was properly done before he took the engine out?

A. He had to see before he left; before he went out.

Q. He had to see whether it was done or not?

A. Yes, sir.

Q. If he could have seen that before it was taken out of the roundhouse, if he had had to wait and inspect it when you had taken it out down there at the coal chute, and it had not been done, then what?

A. We would have had to take it back to the roundhouse and the train would have been delayed.

Q. You would have had to take it back to the roundhouse and the train would have been delayed in working the engine over?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

Q. State whether or not Mr. Padgett was not being held to take out 43, which was a train back to Savannah?

A. I delivered him a message from the roundhouse to Mr. Padgett.

Q. From the roundhouse foreman to Mr. Padgett?

A. Yes, sir.

Q. What time was that train supposed to leave Cayce?

A. It was supposed to leave at 12:20, to leave Columbia at 12:20.

80 Q. Columbia time?

A. Yes, sir.

Q. What time was train 98 supposed to get there from Savannah?

A. I do not remember exactly; something like 11:50 I think.

Q. Where was train 43 coming from?

A. From the north, Richmond and Raleigh, etc.

Q. Who was to take out that train unless 98 got there in time to take out 99?

A. If the man did not get here in time on 98 and in time to take out 99 back Mr. Padgett was to take it.

Q. Mr. Padgett was to take it?

A. Yes, sir.

Q. Who was to take 43?

A. Mr. Padgett was to take 43 and Mr. Radford was to take 99.

Q. Unless the man on what train came in on time?

A. If 98 came in time for his engine to be worked up and go back on 99 he was to do it, and we found out he would be here and Mr. Radford went on his regular run, and that left Mr. Padgett to go out on his regular run the next morning.

Q. But he was held up because if certain things did not take place he would be needed?

A. Yes, sir.

Q. What engine was it you found Mr. Padgett asleep on?

A. Sixty-six's engine, to go on 66.

Q. That was something after four o'clock?

A. Yes, sir; about 4:30 I guess.

Q. And you carried that engine down to the coal chute?

A. Coal chute, water tank and sand track and set it on the wrecker track.

Q. Did Mr. Padgett go on with you?

A. He got off at the coal chute.

Q. Why did he get off?

A. He got off to go back to the roundhouse.

Mr. LYLES: We object.

WITNESS: That is the direction he went.

81 Mr. EVANS:

Q. Do you know for what purpose he went there from the knowledge you had of his engine and of your directions——?

Mr. LYLES: That is pretty speculative; cases cannot be founded on speculation or imagination.

Mr. EVANS: I agree with my friend most thoroughly on that; but here is a man in 75 yards of the place, that knows where this man's engine was placed the night before and knows for what it was placed, and in the conversation that took place, which we cannot bring out, but in consequence of that conversation says that the man went back to this place and went back there for a certain purpose.

The COURT: If he knows what purpose he went back there for.

Mr. EFIRD: He could not know except from what Mr. Padgett told him.

Mr. EVANS: They do not want his knowledge of what the engine was placed there for to come out.

Mr. EFIRD: It is a matter of individual knowledge, that a man cannot tell why one person acts, unless he hears him say so; he cannot know for what purpose he went there unless he heard him say so; he can say he saw him do so and so; it is not according to the rule

to let him testify that he went for a particular purpose, when he could only know that from what Padgett said.

Mr. EVANS: I will withdraw it at the present time.

The COURT: All right.

Mr. EVANS:

Q. What were your duties as hostler over there?

A. To get the engines ready to go out, take them out and have the fires cleaned, and get coal and water and sand.

Q. For whom?

A. For the engineers.

Q. To whom did the engineers apply to know where their engines were when they got ready to go out?

A. They always asked the hostlers.

82 Q. Were you not the proper party to ask?

A. Yes, sir; or the roundhouse foreman.

Q. Would you not know more about that than the roundhouse foreman?

A. Yes, sir.

Q. Were you not also the party that placed them?

A. Yes, sir.

Q. Now, I think that with that knowledge, and he is the agent of the company that placed them there, that he certainly would be capable of testifying as to what took place between him and the engineer, when the engineer came to ask him about his engine?

Mr. LYLES: Your Honor has ruled on that point; that would be permitting this witness to speculate as to what Mr. Padgett did, the entire speculation being based on what Mr. Padgett told him.

The COURT: He testified to all of that, so let the jury infer why he went there; I sustain the objection; that is all.

Mr. EVANS: As I understand it, your Honor, that it is this: that this being the hostler that placed this particular man's engine, and knew where it was placed, and what it was placed there for, that he could not testify, when he was with the engineer that was to go out that morning on that particular engine, that he cannot testify that he sent this man to his engine, that he sent this engineer to his engine, after inquiry from him as to where his engine was.

Mr. LYLES: We object.

The COURT: I am going to stick to my ruling, if it is wrong; go on.

Mr. EVANS: That he cannot testify that?

The COURT: Yes, sir; I have ruled that he could not; let the jury infer.

Mr. EVANS:

Q. Do you know on what track Mr. Padgett's engine was standing that night?

A. It was standing on No. 3 or No. 4.

Q. On No. 3 or No. 4?

A. Yes, sir.

83 Q. Do you know whether or not it was standing on the track over the drop pit?

A. It was the track over the drop pit or the one right next to it.

Q. Or the one right next to it?

A. Yes, sir.

Q. How deep is that drop pit?

A. It is eight feet, ten inches deep.

Q. How was Mr. Padgett dressed when he went with you to the coal chute?

A. He was in his working clothes, his overalls.

Q. Had on his overalls?

A. Yes, sir.

Q. Do you know whether he had a cap on?

A. Yes, sir; he had a cap on.

Q. How far is the coal chute from that pit?

A. About 75 yards from the roundhouse.

Q. From the roundhouse?

A. Yes, sir.

Q. You are sure that Mr. Padgett's engine was in the roundhouse?

A. Yes, sir; I did not put the engine in there, but I took it out.

Q. You did take it out?

A. Yes, sir.

Q. Did you have occasion to go in and out of that roundhouse?

A. All night long.

Q. For what purpose?

A. We had just moved to Cayce, and we had to look out for water and see that the engines were all right.

Q. What time after that did you get on the engine that Mr. Padgett was to go back to Savannah on, and who was with you, and what did you do?

A. The next time I went to the engine that Mr. Padgett was to take; I had my torch and forgot it, and we came to town and got some water and went back on his engine to get my torch off; that was in the morning. I would not say what time, after twelve o'clock.

Q. Now, the next morning what did you do with his engine, you and anyone else?

84 A. Will Ricks and myself got her out of the roundhouse and took her to the coal chute and set her out for him to get?

Q. Who did you come to Columbia with with that engine?

A. Charles Mosley.

Q. What time?

A. About seven o'clock.

Q. At that time did you know that Mr. Padgett had been killed?

A. No, sir.

Q. When did you first find it out?

A. We were at the passenger station and we found it out directly after the train left going to Cayce, that is, 59.

Q. What officers, if any, were at Cayce that night or the following morning?

A. You mean railroad officers?

Q. Yes?

A. Mr. Purvis.
Q. Who is he?
A. Superintendent of the South Carolina division.
Q. Between what points?
A. Between here and Jacksonville.
Q. Between Columbia and Jacksonville?
A. Yes, sir.
Q. Who else?
A. Mr. Thornton, the trainmaster of the North Carolina division.
Q. Where is the North Carolina division?
A. Between here and Raleigh and Monroe and Wilmington.
Q. Did you see anyone other?
A. No, sir.
Q. What were they doing over there at that time?
A. We had just moved to Cayce and everything was blocked and one or the other stayed there all the time.
Q. What was the condition of the yards?
A. The yards were blocked.
Q. What was the condition of the roundhouse at that time?
A. They did not have in any lights and the pits were not covered.
Q. When were you all allowed first to use the roundhouse?
A. The first Sunday in January.
85 Q. Can you look at this calender and tell when it was?

The COURT: Has not that been testified to three or four times?
Mr. EVANS: By only one.

WITNESS: Yes, sir, that would be the 5th of January.
Q. That was on Sunday?
A. Yes, sir.
Q. Was that the date you all moved into the roundhouse and first used it?
A. Yes, sir.
Q. How many days was that before Mr. Padgett was killed?
A. About one week.
Q. Were there any lights at all, or any other signs or signals in or around the pit to keep anyone from falling in it?
A. No, sir; the only lights were the ones the fellows working there has that they carried in their hands.
Q. Were there any in the pit?
A. No, sir.
Q. Or in the roundhouse?
A. No, sir; except where the machinists were working; they had a torch—a hand torch.
Q. And was the roundhouse completed then as it is now?
A. No, sir; it did not have any lights in it.

Mr. LYLES: I object.
Mr. EVANS: I think it is perfectly competent.
The COURT: Go ahead; it is not competent.

Mr. EVANS:

Q. Do you know whether or not at that time Mr. Padgett had just been promoted to a passenger engineer?

A. He was a regular passenger man but he was an extra passenger man before that.

Q. How long had Mr. Padgett been running into this roundhouse?

A. About three trips.

Q. This was his third trip?

A. Yes, sir.

Q. Where did the negro firemen all sleep?

A. Slept on the engines and around in the boiler room.

Q. On the engines and in the boiler room?

A. Yes, sir.

Q. Were there any other places for them to sleep?

A. No, sir.

Q. What was the call boy named?

A. Henry Wallace.

86 Q. Was that the one on the stand today?

A. Yes, sir.

Q. Who was the conductor for the hostler?

A. Charley Cline.

Q. Is he the man that testified here this morning?

A. Yes, sir.

Q. State whether or not you have any interest whatever in this case, except to come here and tell the truth?

A. That is all; I did not come here for anything else.

Q. Were you summoned here by the Seaboard as well as by the plaintiff?

A. I got a message from Mr. Sassard to be here and after I got here Mr. Winters said it would not be necessary for them to summons me.

Q. What position does he hold?

A. Claim agent for the Seaboard.

Q. You have told the truth as you know it?

A. Yes, sir.

Q. You are still working for the Seaboard?

A. Yes, sir; since he got killed I was run off and taken back.

Q. Run off and taken back?

A. Yes, sir.

Q. How long ago?

A. About three months ago; I was run off on the 4th day of April.

Q. And you have been working there ever since then?

A. Yes, sir

Q. There have been no threats made against you?

A. I have not heard of any.

Cross-examination by Mr. LYLES:

Q. Mr. Radford went out on 43 that night?

A. Yes, sir.

Q. And Poteat went out on 99?

A. I do not remember whether it was Mr. Poteat; when the engine came in I was not at the train.

Q. The man that came up on 98 went back on 99?
A. Yes, sir.
Q. Was it known before Mr. Radford left that he would be there?
A. Yes, sir.
87 Q. And Mr. Padgett knew he was going back on his regular run?
A. Yes, sir.
Q. That was before 43 left?
A. Yes, sir.
Q. And 43 was due there at 11:49?
A. That must be the south end time.
Q. From 12:20 and some time before Mr. Radford went out at 12:20 Mr. Padgett knew that he would take his regular run?
A. Yes, sir.
Q. And it was after he knew that he was not going out on 43 that he went to sleep on 66?
A. He went to the hotel and could not get a bed.
Q. And he went to sleep on sixty-six's engine?
A. Yes, sir.
Q. And he was there asleep when you took out that engine?
A. Yes, sir.
Q. And that was about 4:30?
A. Yes, sir.
Q. And Mr. Padgett was due to leave there at what time?
A. He was supposed to bring his engine from Cayce, and that put him on duty a little earlier.
Q. What time?
A. They generally were due at the yard office by six o'clock every morning.
Q. By six o'clock?
A. Yes, sir.
Q. That was the last time you saw Mr. Padgett alive when he left you at the coal chute?
A. Yes, sir.
Q. How long have you been a hostler?
A. I have been working with the Seaboard on and off ever since 1906, and I have been a hostler most of the time.
Q. Over there at Cayce, what did the engineers coming in from Savannah—like Mr. Padgett—do, where did they leave their engines; did they not have a particular place?
A. They would stick them in any of those tracks belonging to the roundhouse.
Q. You mean the cinder pit track or the hostler's track?
A. They have got a pit track the clinker pit track, and the track at the coal chute, and the repair track.
88 Q. Down at that roundhouse yard, around the train master's office?
A. Yes, sir.
Q. And those tracks are not in the roundhouse?
A. No, sir.

Q. A man would leave his engine out there somewhere at the yard office or somewhere between there and the roundhouse?
A. Yes, sir.
Q. And you know the saying that the engines belong to the company and the runs belong to the men?
A. Yes, sir; and mighty near all the engineers have a regular engine assigned to them.
Q. Does not the company own the engines?
A. Yes, sir; but each man has an engine assigned to him.
Q. If for any reason they want to take an engine and put it on another run, they do it?
A. Yes, sir.
Q. Do you not know that they would not take an engineer off his run except for some particular reason?
A. Yes, sir.
Q. And the passenger engineers go by runs?
A. Yes, sir.
Q. If they take a man off his run and put another man on there he gets paid if he does not make the run?
A. I do not know how that is now; they used to.
Q. As a hostler, you were to take the engine and fix it up and take care of it until after the engineer was called the next morning?
A. To take them and have the fires cleaned.
Q. And do anything that he required?
A. No, sir; the machinists did that.
Q. But the engineer did not make any repair work on his engine?
A. No, sir.
Q. That is for the hostlers and the machinists?
A. Yes, sir.
Q. After you had finished with an engine and after the machinists had finished and when it came time for them to go out where would you take it and put it for the engineer?
A. Sometimes at the roundhouse; wherever we had room.
89 Q. Wherever you had room on those tracks between the yard office and the roundhouse?
A. Yes, sir.
Q. And he was called to come and take his engine?
A. Yes, sir.
Q. And that was the regular thing they went through with?
A. Yes, sir.
Q. That is what they did?
A. Yes, sir.
Q. And even by the time 43 came in that night, or before 43 came in, they knew everything had been straightened out and they knew each man would take his regular run?
A. Yes, sir.
Q. And they found out that they would use the regular engines on that run, on those runs?
A. Yes, sir.

Q. What engine did Mr. Padgett come in on?
A. 35.
Q. How long had he been running 35?
A. He had her in use on the regular passenger run.
Q. How long?
A. Two or three trips.
Q. Was that the same engine you took out that night that he had been running for two or three trips?
A. Yes, sir.
Q. That was the same engine you saw in the roundhouse?
A. Yes, sir; that was the same engine I took out.
Q. That was the same engine he had been using on two or three trips?
A. Yes, sir; I took her out of the roundhouse.
Q. You are not positive as to the number of that engine?
A. It was 35.
Q. Suppose I show you that the engine Mr. Padgett had been using was 67 and not 35, would you not think you had made a mistake as to the number?
A. If you prove it, certainly.
Q. You are going by the back; you saw the engine Mr. Padgett had been using?
A. The engine he brought in was the one I took out.
90 Q. When was the first time you took charge of that particular engine?
A. I received it at the yard office from Mr. Radford.
Q. And you took the engine to the clinker pit?
A. Yes, sir.
Q. And what did you do with it?
A. I left it at the clinker pit and got three or four engines and came to Columbia for water.
Q. You left that engine on the clinker pit?
A. Yes, sir.
Q. And you did not see that engine any more?
A. When I got it out of the house the next morning I went on it and got a torch off of it.
Q. Who took the engine and set it out for 59 the next morning?
A. I sent it out in the yard and Mr. Mosley brought it to Columbia.
Q. Who set it on that track for the engineer and brought it out of the roundhouse?
A. I did.
Q. And that was the engine that went on 59?
A. Yes, sir.
Q. And Mr. Aldridge had nothing to do with it?
A. He put the engine in the house; I did not put it in; I just took it out.
Q. You did not put it in roundhouse?
A. No, sir.
Q. And it is up to you and Mr. Aldridge as to who put it in the house?

A. Yes, sir.
Q. You were the only ones to handle that engine?
A. When we got pushed up the machinists helped us out.
Q. When you went into the roundhouse you carried a torch?
A. I did not have one until Mr. Padgett brought it to me; they did not have any at Cayce when they moved over there.
Q. The engineers have a torch on their engines?
A. Yes, sir.
Q. And every engineer has a torch?
A. Yes, sir.
91 Q. And Mr. Padgett had one over there that night?
A. He had more than one; he gave me one.
Q. He had two?
A. He must have had more than that; him and his fireman are supposed to have one all the time; he must have had three.
Q. This hole, this pit, this drop pit, was back here?
A. Yes, sir; it covers two tracks.
Q. It is a big hole?
A. It covers two tracks.
Q. There is one in the roundhouse, one of those pits, a place cut out so you men can go under the engines?
A. Yes, sir.
Q. How deep is that down under there?
A. About three feet.
Q. That is, under each track?
A. Yes, sir.
Q. That is a different place?
A. Yes, sir; several at the back.
Q. And there is a plankway running between each track for people to walk?
A. Yes, sir.
Q. And the pit in question runs across two of them—two tracks?
A. Yes, sir.
Q. When you left them there at the yardmaster's office that night, did you see engineer Radford?
A. Yes, sir.
Q. Was he there with Mr. Padgett?
A. Yes, sir; I left them both together.
Q. Was Tom McDonald on the engine?
A. He went to the clinker pit on the engine with me.
Q. And Tom was the fireman?
A. Yes, sir.
Q. You do not know exactly when it was that Mr. Padgett found out that everything was all right; that he would not run on 43 or 99?
A. No, sir.
Q. But it was before 43 left?
A. They must have run Mr. Radford.
Q. Were you not having some trouble with the water supply that night?

A. Yes, sir; we had to come to Columbia for water.

92–103 Q. And were you not kept pretty busy carrying engines to Columbia for water?

A. Aldridge and myself.

Q. And was not the work divided up and you gave up your job?

A. Not altogether.

Q. You were perfectly willing to that?

A. I think I brought a lot and Mr. Aldridge a lot; I would go once and him the next time.

Mr. EVANS:

Q. You are not sure what engine Mr. Padgett brought in from Savannah, but you are sure what engine he was to take out next morning?

A. Yes, sir; I would not swear the number, but I know I got his engine out of the house, the engine that was supposed to go on his run; it has been so long you cannot remember those things.

Q. Now, the next morning the engine that he was going to Savannah on, did you and Captain Mosby, the engineer, did you go with him to take that engine to pick up the train?

A. Yes, sir; I got off at Columbia?

Q. That was the engine he was to take to Savannah?

A. Yes, sir.

Q. And it was 35; and you were on there with Engineer Mosby?

A. Yes, sir.

Mr. LYLES: That is leading.

The COURT: Do not lead him.

Mr. EVANS:

Q. You went to bed then?

A. Yes, sir.

Q. You slept in the daytime and worked at night?

A. Yes, sir.

Q. And Engineer Mosby, what did he do?

A. He took the train on back to Savannah, but I thought Mr. Padgett would show up at Cayce.

Q. You need not state that?

A. That is right.

104 HENRY WALLACE (colored) recalled:

Mr. EVANS:

Q. On the morning of the 12th, after you could not find Mr. Padgett, where was he finally located?

A. In the pit.

Q. In the drop pit?

A. Yes, sir.

Q. Did you see him in there?

A. Yes, sir.

Q. Did you stay there until he was taken out?

A. No, sir.
Q. Did you see him again after he was taken out?
A. Yes, sir.
Q. Where was he lying?
A. Lying down by the side of the pit there.
Q. Was he dead?
A. Yes, sir.

Mr. LYLES: No questions.
Mr. Evans: That is our case.
The COURT: The plaintiff rests?

105 *Defense.*

R. H. GARRETT (white) sworn:

Direct examination by Mr. LYLES:

Q. Are you in the employ of the Seaboard?
A. Yes, sir.
Q. In what capacity?
A. Resident engineer.
Q. At what point?
A. Tampa, Florida.
Q. Where were you employed in January, 1913?
A. At Cayce, S. C.
Q. State whether or not you were the engineer in charge of the building of the Cayce yards, including the roundhouse?
A. Yes, sir.
Q. Have you a blue print showing the layout of the Cayce yards?
A. Yes, sir.
Q. Now (presenting plat), tell us which is towards Savannah and which is towards Columbia?
A. Here is Savannah down this way; these lines here run to Columbia; this is the five-span bridge across the river.
Q. Does that blue print show what is called the yardmaster's office?
A. Yes, sir; the yardmaster's office is right there.
Q. That also shows the so-called depot at Cayce?
A. I never heard it called that; I suppose it could be called that.
Q. Does this show the main line in coming from Savannah and passing through that yard?
A. This track is the main line.
Q. It is the big main line?
A. Yes, sir; the big main line.
Q. What are those tracks to the east of the main line?
A. Those are spur tracks, yard tracks.
Q. State whether or not they are the switching tracks?
A. The switching tracks.
Q. Will you point out the water tank?
A. Right there; this is the sand house.
106 Q. Now, point out where the cinder pit is?
A. Right here.

Q. Point out the tracks running from the yardmaster's office up towards the roundhouse?

A. These tracks running along up here right straight by the water tank by the coal chute, and either go across here; this is the cinder pit here.

Q. That is what is called the cinder pit track?

A. This is the cinder pit track.

Q. Where is the hostler's track?

A. All of these tracks might be called hostler's tracks; there is no track by that particular name.

Q. Where is the roundhouse?

A. It is here.

Q. Where is the turn-table?

A. Here.

Q. What is that room back there, the boiler room?

A. At present they have a small machine shop for light repair work.

Q. At the time Mr. Padgett was killed?

A. Yes, sir.

Q. Were you there then?

A. Yes, sir.

Q. Were you in charge of the work?

A. Yes, sir.

Q. Do you know of the progress it had made at that time?

A. Yes sir.

Q. Tell us whether or not there was any machinery in the machine shop at the time he was killed?

A. No, sir; there was no machinery there.

Q. Do you happen to know where the book called the engineer's register book was kept at that time?

A. When they first came there they made this desk for the register book and they made a little shelf right across this wall of the machine shop right to the right of the door leading into the boiler room; like this is the roundhouse here; there was a little door going into the boiler room on the side next to the wall was the register book kept on a little desk.

Q. Was it there the 11th and 12th of January?

A. Yes, sir.

107 Q. Supposing this room is the roundhouse, state whether or not that little room, the jury room, would be in about the relative position as the machine shop?

A. Yes, sir; the same relative position with the exception of the door. The door would be over this way.

Q. And this would be in the direction of Savannah?

A. Yes, sir.

Q. And this would be in the direction of Columbia?

A. Yes, sir.

Q. To get into the machine shop from any point towards Columbia would you go into the roundhouse at all?

A. No, sir.

Q. How would you get in there?

A. There was a large door in the end of the machine shop towards Columbia, there was a large door in the end of the boiler room and there was a door from the boiler room into the machine shop.

Q. To go from the yardmaster's office into the machine shop you would not have to go into the roundhouse?

A. No, sir; you would not.

Q. Did you see this sketch Mr. Chislomn had of the roundhouse?

A. Yes, sir.

Q. That is approximately correct?

A. Yes, sir; that is approximately correct; a few dimensions are not correct.

Q. What are the differences?

A. The heighth of that lower rail, the one next to the bottom.

Q. What is the correct depth of the pit?

A. Five feet ten inches is the average depth; there is a slight variation on account of the drainage.

Q. What is the average depth of it?

A. In the main ten feet ten inches.

Q. He has it ten feet eight inches?

A. He probably measured at the shallow end.

Q. His measurement is practically correct?

A. Yes, sir.

Q. How about the width of that?

A. The width between the walls is seven feet.

108 Q. He has it seven feet?

A. I think not; this shoulder comes in here.

Q. That is seven feet instead of eight feet six inches?

A. Yes, sir.

Q. In the main it is practically correct; he has it one and a half feet more?

A. He did not allow for that shoulder.

Q. Now, starting at the yardmaster's office in the first place, where it is marked off here hotel; who ran that hotel at that time?

A. Mr. Simpson was in charge, but it was leased by J. W. Darden.

Q. Who built it?

A. The railroad.

Q. Do they run it?

A. No, sir; they have nothing to do with it.

Q. Who was it run by?

A. I understood Mr. Darden.

Q. State whether or not it was leased?

Mr. EVANS: The lease is the best evidence.

The COURT: That don't make any difference about that.

Mr. EVANS: That does have some bearing on it; I know exactly what he is leading to; if that hotel was run by the Seaboard they are supposed to run it properly and take care of their employees, and if this man went there to get a room, and could not get one——

The COURT: There is nothing alleged in this Complaint about a hotel.

Mr. EVANS: It says a reasonably safe place.

The COURT: To work.

Mr. EVANS: And in which to transact business, and that was the only place he had to go. The Supreme Court of the United States has held that where a man had left his engine at a junctional point—Burgess vs. S. A. L.—that went up from North Carolina the other day, and it is not yet in print, that where he had run his engine into a junctional point and had left his engine and had gone across the railroad, on the other side of the railroad, to eat his dinner out
109 of a tin bucket, that he was engaged in interstate commerce and the point I mean to make is this: that this man, in going to and from a hotel to the railroad property, owned by the railroad and in their control, is railway property, and that they should maintain that and run it in a reasonably place for railroad employees to travel to and fro.

The COURT: Exactly; we are trying this case on acts of negligence; the issue raised is not an issue, it is collateral; go on.

Mr. LYLES:

Q. Who ran the hotel?
A. You mean who had direct charge?
Q. Who ran the hotel?
A. Simpson.
Q. Did the Seaboard have anything to do with running the hotel?
A. No, sir.
Q. Can you tell us the distance from the yardmaster's office first to the turn-table?
A. About one thousand feet.
Q. What is the approximate distance from the yardmaster's office to the first end of the machine shop?
A. About nine hundred feet.
Q. What is the approximate distance from the yardmaster's office to the water tank?
A. About three hundred feet.
Q. How far is it from the yardmaster's office to the coal chute?
A. That is 475 feet.
Q. How far is it from the yard office to the cinder pit?
A. It is 660 feet.

Q. We offer this plat in evidence.
Mr. EVANS: We have no objection.
(Exhibit No. 7.)

Q. Will you come down here and show the jury just a minute; please explain to the jury which is towards Savannah?
A. Savannah is in this direction.
Q. Which direction is Columbia?
A. Columbia is here.
Q. Where is the yardmaster's office?
A. Right here.
110 Q. What are those tracks running from there to the cinder pit?
A. These are tracks here.

Q. Where is the water tank?
A. Right here.
Q. Where is the coal chute track?
A. This is it running out here; let me explain about the coal chute, there is a delivery track and a receiving track, the coal is taken into the chute here, the cars are put on here, and when the coal is delivered it is delivered down here on this track, and then they bring them out on the coal chute track, what we call the coal chute track, or delivery track, this is the one they take them off on, where the engines goes in there.
Q. Where is the cinder pit?
A. Right here.
Q. Where are the tracks that run to the turn-table?
A. From here, they go across here.
Q. You can get on the turn-table from any one of them?
A. Yes, sir.
Q. And the turn-table goes to any of those tracks?
A. Yes, sir; outside; it crosses there.
Q. All of those tracks indicate the outside of the roundhouse?
A. Yes, sir.
Q. What are those tracks right there?
A. They are short tracks.
Q. How many are there?
A. Eight.
Q. Where does the roundhouse run back to?
A. This is the wall right here.
Q. That is a track next to it?
A. It clears the roundhouse; there is eight feet between the track and the roundhouse.
Q. Where does it end?
A. It ends right here.
Q. What is the roundhouse built of?
A. Reinforced concrete.
Q. The walls run up and down this way?
A. It is a little circle, but the side is straight between the columns.
Q. It is covered inside with concrete and those eight tracks are on the outside?
A. Yes, sir.
111 Q. How many inside of the roundhouse?
A. Ten tracks.

Cross-examination by Mr. EVANS:

Q. Is that the condition of the tracks in the roundhouse and of all those tracks at the time Mr. Padgett was killed?
A. Yes, sir.
Q. Were all of those tracks here, in?
A. Yes, sir.
Q. Every single one of them?
A. Yes, sir.
Q. And every single one of those other tracks?
A. Yes, sir.

Q. All in?
A. Yes, sir.
Q. On what date?
A. I have in my book what date they were completed.
Q. The map does not show it?
A. They were completed at that time.
Q. Look at that map and tell me whether it shows on there the date?
A. No, sir; only the date the map was made.
Q. Does not a civil engineer place on his map or drawing the date, the proper date, and data that was there; is not that proper engineering?
A. The map does not show the date.
Q. Do not the engineers representing the government, in drawing a map, place in this corner the scale and everything pertaining to the map?
A. The scale is on there.
Q. Answer that question, yes or no?
A. I do not understand the question.
Q. I say an engineer, a civil engineer, to properly draw a map, and when he expects it to be used in evidence, to have the proper data, those representing the United States Government, or any other government property, if he does not place on his map the date and all other data with reference to it down there?
A. This map was not made for this case.
112 Q. Answer my question?
A. You asked me as to what the United States engineer does.

The COURT: He says he does not know.

Mr. EVANS:

Q. How long have you been a civil engineer?
A. About eight years.
Q. You ought to know something about civil engineering?
A. I think I do.
Q. You have been employed long enough?
A. I think I have.
Q. Where else have you been employed besides the Seaboard?
A. The Tidewater and Washington and Southern.
Q. Have you ever been associated with United States civil engineers?
A. No, sir.
Q. You do not know what data they show and what they do not show?
A. Not with reference to United States engineers, but with railroad work, I do.
Q. In any view of the work, why is it not best to be more specific in the data, where the occurrence is supposed to have taken place on a specific date, to show the exact condition on a particular date: did you do it or not?
A. No, sir; I do not see your point; this map was not made for

this specific instance, but this is the same as when the map was made, and the same conditions.

Q. What is the date of this map?

A. Made in the office June 9, 1913.

Q. When was Mr. Padgett killed?

A. He was killed on the morning of the 12th of January.

Q. And this map was not made until six months afterwards?

A. The map itself was made six months afterwards; the conditions and the house was not changed or altered.

Q. And you are now willing to testify that each piece of work as you have illustrated on this map when you made it in June,
113 1913, was absolutely completed January 12, 1913, on the night that Mr. Padgett was killed?

A. With reference as to the tracks, as you asked me.

Q. I am asking you about what you put on this map; I want you to swear whether it was completed absolutely?

A. The track work was absolutely completed.

Q. I ask you if you have got it on this map showing the completion in June, 1913, as completed in January as you have got it showing?

A. Not everything.

Q. You could have answered that half an hour ago?

A. You never asked me the question directly.

The COURT: There is no use to argue about it.

Mr. EVANS:

Q. Where is there on this map as being completed in June, 1913, was not completed in January?

A. These small houses here.

Q. What else?

A. These racks for coal and this transfer platform was not there.

Q. And the machine shop?

A. The machine shop was there.

Q. And the machinery in it?

A. No machinery in it.

Q. You have it showing machinery in it?

A. No, sir; you can't show me any machinery.

Q. Look at those houses here?

A. They were warerooms, as I have just told you.

Q. Anything else?

A. The sand house was not here, which we have not mentioned.

Q. When were those houses placed there? When were those bath houses or wash houses placed there?

A. They were brought from the park yard; they are old cars.

Q. When were they put there?

A. Early in January; I think most of them were there on the 5th or 6th of January.

Q. You said they were not there on the 12th?

A. They were not in place on the 12th.

Q. Where are the water closets for officers and agents?

A. There are three; two located in the hotel and one there.

114–116 Q. How far is the hotel from the roundhouse?

A. About one thousand or eleven hundred feet.

Q. That is half a mile?

A. No, sir; not one-fourth of a mile.

Q. How many yards is it?

A. About three hundred yards.

Q. Have you got any equipment in the roundhouse for your employees of that nature?

A. I do not know whether I should answer that question.

Q. I ask you that, and I ask the Court to rule as to whether you should answer it or not.

The COURT: What has the water closets to do with it?

Mr. TIMMERMAN: To test him about this map.

The COURT: Go on.

Mr. EVANS: It is now past the time to adiourn, and this is one of the most important witnesses that I have got to examine.

The COURT: I am not going to stay here any longer.

Mr. EVANS: This witness is one I want to thoroughly examine.

The COURT: Then he will have to stay over. Gentlemen of the jury, remember what I told you at dinner time about talking about this case. Be in your seats tomorrow morning at nine-thirty.

February 11, 1914.

117 W. B. HOOPER (white) sworn.

Direct examination by Mr. LYLES:

Q. What is your present position?

A. Car inspector.

Q. For what railroad?

A. The Seaboard.

Q. What place?

A. I am in Columbia now.

Q. Where were you January 11th and 12th, 1913?

A. At Cayce.

118 Q. The morning that Mr. Padgett was killed, did you go there to take him out; were you the man that took him out of the pit?

A. Yes, sir; I helped get him out.

Q. How did you get him out?

A. I tied a rope around him and we lifted him out that way.

Q. Did you give Mr. Garrett information as to where his body was found?

A. Yes, sir.

Q. Will you tell the jury in what position you found his body?

A. When I went there in the pit he was lying very nearly flat of his back, with that hand to his side and this one across out this way.

Q. Supposing that this was the drop pit here, where was his feet and where was his head?

A. He was lying towards Columbia, his head was towards Columbia and his feet lying towards the engine.

Q. Now on this plat here; do you recognize this; this is the Columbia side here; here is the turn-table?

A. Where is the drop pit?

Q. Right here?

A. You come in one the left side here; he was in that third track on the left side coming out.

Q. On the third track from the Columbia side?

A. Yes, sir.

Q. His feet were towards Savannah?

A. The pit runs this way; his feet were down this way.

Q. And his head was this way?

A. Yes, sir.

Q. With reference to the track that there is there, was his body parallel with that track?

A. Yes, sir; he was lying right plum in the middle of it.

Q. Which side of the pit?

A. The Savannah side.

Q. And the body was nearer the Savannah side or the Columbia side this way?

A. He was nearer the Savannah side.

Q. Look and tell us if that red mark represents the position in which you found his body?

A. Yes, sir.

119 Q. What time was it when you found him there?

A. It was about 7:30, Eastern time; 6:30 our time.

Q. You went there when he was found?

A. Yes, sir.

Q. And that is when you took him out?

A. Yes, sir; that is when I took him out.

Q. Did you notice any bruises on the face or person of Mr. Padgett?

A. The left side of his face was black and his left eye was swollen up and black.

Q. With reference to that eye, was that eye bruised?

A. I could not tell on account of it being black.

Q. Was his nose broken?

A. I could not say.

Q. Was it mashed in?

A. I do not know.

Q. Or any bruises on his nose?

A. I did not see any at all.

Q. Do you know anything else at all?

A. No, sir; that is all I know.

Cross-examination by Mr. EVANS:

Q. Come over here and hold this map to the jury; this is looking towards Savannah and this is looking towards Columbia, and this

would be north, the Columbia side, that would be going towards Columbia on your left and this would be on your right?

A. Yes, sir.

Q. That is the location of the drop pit there?

A. Yes, sir.

Q. That drop pit is about how deep?

A. About 12 feet.

Q. When you go down there a certain distance, six or eight feet, there are some iron rails, another little track?

A. Yes, sir.

Q. What are they for?

A. I do not know.

Q. After you get down in there the pit is much narrower?

A. No, sir; I think it is the same all the way down. That is the first and last time I have ever been in there.

Q. Did you find Mr. Padgett right down at the very bottom?

A. Yes, sir; he was down at the bottom.

120 Q. In falling in there, if his face had struck one of those iron rails would it have made that bruise on his head?

A. I suppose so.

Q. If the fall had been great enough?

A. I suppose so.

Q. This pipe is how far this way, do you know?

A. I do not know.

Q. Do you know how wide the pit is?

A. No, sir; I do not know.

Q. Was his body lying up and down this way or across this way?

A. This is the pit.

Q. Yes?

A. It was lying this way.

Q. Now, mark it with a lead pencil where he was lying?

A. This is the pit; he was lying this way, just like that mark in there.

Q. Put your lead pencil there?

A. It was like that here.

Q. Where was his head?

A. His head was here and his feet were here.

Q. Make a cross mark where his head was?

A. Right.

Q. Now put one where his feet was?

A. Right here.

Q. You gentlemen over there can see this?

—. ——.

Q. Was that pit covered over?

A. No, sir.

Q. It was not covered?

A. No, sir.

Q. Were there any lights in the roundhouse?

A. No, sir.

Q. How long had you all been running in there?

A. We moved over there on the 5th of January.

Q. And Mr. Padgett was killed on the night of the 11th and morning of the 12th?

A. Yes, sir.

Q. You had been running in there only five or six days?

A. Yes, sir.

Q. Did you notice where there was a wound on the top or back of his head?

A. No, sir?

Q. Do you know whether his neck was broken?

A. No, sir; I could not tell.

Q. State whether or not he was warm at the time you found him?

A. He was cool but not cold.

121 Q. Cool but not cold?

A. Yes, sir.

Q. Did you not testify this at the inquest; see if you cannot refresh your memory as to what you said, did you not say: "I am car inspector for the Seaboard; when I was in the yard that morning Mr. Somebody, another engineer, said Mr. Padgett had fallen in the pit and killed himself; I went in the pit and found Mr. Padgett lying flat of his back," and that you found the body about 7:30, or 6:30?

A. Yes, sir.

Q. That is 7:30 our time?

A. Yes, sir.

Q. Now, on yesterday you would not let me bring the present conditions of the roundhouse at the present time; I think on cross-examination I would have the right to bring out the condition of the roundhouse at the present time as to how it is equipped at this time?

The COURT: I do not think so. That would get in on cross-examination what is not admissible testimony contrary to law, and I cannot let it in. Subsequent repairs is incompetent as a matter of law. You must confine yourself to the existing conditions at the time of the injury; there is no doubt about that.

R. H. GARRETT, recalled.

Cross-examination by Mr. EVANS:

Q. Has that map any date on it?

A. June 9, 1913.

Q. Read all of this?

A. Seaboard Air Line Railway, Map of Cayce Yards, Cayce, S. C., office of assistant engineer, Jacksonville, Florida, June 9, 1913. Scale one inch per hundred feet. The only thing effected is the yard track, the main line south of the yard.

Q. This is the roundhouse, is it?

A. No, sir; this is it around here.

Q. Of course these little tracks out here are not within the roundhouse?

A. No, sir.

Q. This is the roundhouse from here to here?
A. Yes, sir.
122 Q. And the turn-table is out here?
A. Yes, sir.
Q. The engines for repairs are taken in and out of the roundhouse by the turntable?
A. Put on the turn-table and put on any track you want.
Q. Your pit is located where?
A. Across two and three; we start at this end and number them from one to ten.
Q. What is the condition of that pit?

Mr. LYLES: We object.

WITNESS: The pit is completed.

Mr. EVANS:

Q. Completed?
A. Yes, sir.
Q. When?
A. At the time of the accident.
Q. At the time of the accident?
A. Yes, sir.
Q. Was it covered then?
A. No, sir.
Q. It was not covered then?
A. No, sir.
Q. Then you call it completed?
A. It was completed according to the plans and specifications.
Q. You are going to stick to that?
A. Yes, sir; absolutely.
Q. What have you got it covered up now for then?

Mr. LYLES: Your Honor has ruled on that half a dozen times. He says, is the pit completed, and he says it is; now Mr. Evans says, what have you got it covered for now? That is an indirect way of bringing that which has been ruled out.

The COURT: I have ruled that out.

Mr. EVANS: He says it was completed at the time of this accident; I have a right to test his credibility and to test him. He says it was completed; he says it was not covered over, now the next question I said was: Why have you got it covered now?

The COURT: Well——

Mr. LYLES: We object to that line of questions.

The COURT: I think that was overruled in my ruling.

123 Mr. EFIRD: When counsel persists in bringing out this question in this way, bringing it out before the jury, I think counsel ought to desist from it after your Honor has ruled it out.

The COURT: I am going to have it understood——

Mr. EVANS: I want to say this——

The COURT: Another thing; when I rule, I rule. Of course counsel will stop argument. If I rule wrong, let the Supreme Court re-

verse me. Whenever I rule, you gentlemen bow to it. Do not get in testimony in an indirect way which I have ruled out as incompetent.

Mr. TIMMERMAN: In reply to what Mr. Efird says, I will state to your Honor that I do not think that question raised a moment ago compares with the question that has been — before, for the very good reason that when a witness makes a declaration which you do not believe is true, you have a right to purge him by any means to determine whether it is true, not that it is material issue, except to show him up on the witness stand. In other words, we can allege in a complaint that here is a completed pit, an incomplete pit and a pit that is not properly shaped to work in, and they can put a man on the stand to swear it is complete.

The COURT: My ruling is as to subsequent repairs.

Mr. LYLES: We never asked him the question at all.

The COURT: The witness has answered that question; go on to something else.

Mr. EVANS:

Q. Did you have any lights in the roundhouse at the time of the accident?

A. No, sir.

Q. You did not?

A. No, sir.

The COURT: That is directly in issue.

Mr. EVANS:

Q. You have been moved away from Cayce?

A. Yes, sir; I finished the work.

124 Q. And sent to Jacksonville?

A. Tampa, Florida.

Q. Where did you make this map?

A. I made the survey at Cayce, and the map was made in the Jacksonville office, and sent back to be re-checked, so the measurements could be sworn to in court.

Q. You are the man that made these plats?

A. I made the measurements and checked them up afterwards.

Q. Who had charge of the building of the roundhouse?

A. I did.

Q. Who made the plans?

A. The original plans of the roundhouse were made in Mr. Purvis' office, the building and the plan, and I afterwards made this plan covering everything that was to be done.

Q. You had charge of the general building?

A. Yes, sir.

Q. When was it you turned it over as being completed?

A. January the 5th.

Q. As being completed?

A. Yes, sir.

Q. Did you not afterwards, after this accident, get letters——

Mr. LYLES: We object to counsel asking questions as to what he did after the accident.

Mr. EVANS: It certainly seems that we have the right to test the credibility of this witness. I wish your Honor would read paragraph eight of our Complaint, and there is no other way that we can allege that the thing was incomplete, except by the method we are pursuing; it is not our purpose to bring out incompetent testimony.

The COURT: Paragraph eight says (reads 8th paragraph of Complaint).

The COURT: Go on, not on the question of repairs, but on the question of completion; they allege here that it was not completed.

Mr. LYLES: The witness says it was completed; they are bringing that out; your Honor has ruled it out half a dozen times.

125 The COURT: I am going to stick to my ruling as to subsequent repairs, but as to whether the thing is completed or not; you allege it was incomplete.

Mr. EFIRD: He has answered that question.

WITNESS: I said it was complete.

Mr. EVANS: There comes in a question I think is admissible, in which, as I said, we have alleged that it was incomplete, now how can I go on and prove that they had completed it since; they could not complete it before it was not completed; and how can I bring it out whether it was completed or not; I am not trying to prove repairs afterwards; I have alleged that at the time of this accident it was not completed, and not reasonably safe, and how can I prove it unless I ask this witnes whether he had certain things in there, and whether he has put them in there since the accident which completed it, because I have alleged that it was not completed. It is not on the question of repairs.

Mr. EFIRD: We are in no way bound to accede to anything of that kind to prove their case; if they allege anything is incomplete he has to prove it; he has no right to appeal to the Court to be lenient in the admission of evidence or give him latitude more than the law allows. He made the allegation and he must prove it. The point we are objecting to is this: The witness was asked this question: was this roundhouse complete at the time of the accident and when it was turned over, and his answer was, yes.

Mr. TIMMERMAN: He volunteered that answer.

Mr. EFIRD: We do not object to that. The next question is, after this roundhouse was turned over, after the accident, did you not get a letter from some one about so and so; that is what we are objecting to. He wants to get these letters in which some one has written him after the thing happened in order to test his statement as to whether it was completed at the time of the accident; if he makes the positive statement that it was completed, then they must show

126 that it was not. They must contradict him, showing that it was not complete, not by what some one else said or that some one else called his attention to it. Therefore, we submit that it brings up the very thing that your Honor has been ruling against, as to subsequent repairs; that is the point up now before the Court.

Mr EVANS: We have not alleged that the roundhouse was under repairs; we have alleged that the roundhouse was incomplete, and

unfit, and not fit to be used, and not completed. The only way we can prove it under the rules of evidence as to whether it was completed is by showing the condition of the roundhouse at the time of the accident and showing the condition of it after the accident, when it was completed, if anything else was done; if nothing else was done, it must have been completed at the time of the accident. But the only method we can prove it is to show whether it was done or not, whether anything was done to it or not in order to complete it or not; that is exactly the point, not on the question of repairs, but on the question of whether it was completed and in a safe condition to be used at the time.

Mr. EFIRD: That is exactly the same thing. They cannot bring out any evidence to show that anything has been done to this roundhouse or pit after the accident in no way whatever. If they have alleged that it was incomplete they must show it. If they ask this witness if it was completed and he says yes, they must show by facts that at that time it was not completed, and that is a fact, and they cannot show it by showing its present condition or its past condition, because if they do that, they go into the question of what has been done to the pit since, and when they go into that field, they go into the question that your Honor has ruled time and time again. They must be confined to that particular fact, as to what was the condition at that time.

127 Mr. TIMMERMAN: Now, with reference to that, I wish to show by illustration, following the same argument, he says because the fact that the building was changed; it might possibly prove that it had been repaired, or might possibly prove that it had been completed, or might possibly prove that it had been changed, but because it might prove one thing you cannot prove another thing. We are not seeking to prove repairs. He would take the position on the same theory that we could not prove that the railroad had destroyed these facts, because it might tend to show an enlargement, or it might show, or tend to show, a distinct thing by another; we would be precluded from showing that, because the same set of facts might be used to prove repairs. We are not seeking to prove repairs. We cannot bring those facts out to prove that a building is not completed at the time, simply because, under the circumstances it might show that repairs had been made, but in this case it has been brought out, and it is before the Court, that this was a new building and the fact that on one day you find it in one condition, and in another condition on the next day, and nothing more appearing, indicates that it was not completed, because they do not repair new buildings. Who ever heard of a man building a building one day and repairing it the next day, unless some disaster came along.

The COURT: The question here is one of repairs and completion. What is the rule about repairs, that charges a defect in a car wheel, for instance. They cannot show that it was defective by showing that you worked on it afterwards. Now, here is a house that is alleged to be in an incompleted condition, and your contention is that they cannot show that work was done on the house subsequently to complete it.

Mr. LYLES: That is not it. The rule forbids any subsequent additions; what they want to prove is this, to show that this pit
128 was subsequently covered. That is what they want to show, and that they subsequently put lights in the roundhouse; suppose so, that would be an addition, or cement gates that were put in subsequently, it is not the question of repairs, but a question of additional cement gates.

The COURT: There is no doubt in the world that that is the same thing; that is practically the same thing as subsequent repairs, and I am going to strike it out. That is my view of it, and I am going to rule it out.

Mr. EVANS:

Q. At the time of this accident, were there any lights in the roundhouse?

A. No, sir.

Q. Was the pit covered?

A. No, sir.

Q. Under whose orders were the *employees* turned in the roundhouse?

A. I do not know.

Q. Whenever you got it ready to turn over, to whom did you report?

A. To the assistant engineer at Jacksonville, and the chief engineer at Portsmouth.

Q. What did you report?

A. I do not know the wording of it.

Q. You did not hunt it up?

A. No, sir.

Q. It has not been over a year; is it not a very important thing?

A. I made 60 or 70 reports a week, and I would not be expected to remember one.

Q. State whether or not you reported on the 5th of January that this roundhouse was begun to be used by the employees of the Seaboard?

A. It was. Whether I reported it or otherwise, it was begun on the 5th of January.

Q. And Mr. Padgett was killed on the 12th?

A. I heard it on the 12th.

Q. That was five or six days after it was occupied?

A. Seven days.

Q. Occupied for the first time?

A. It was about the 5th of January, but they had been using a part of it previous.

129 Q. Which part?

A. They had turned several engines; they had been using this yard, or a part of it, in February previous, the previous year, and had been using practically the whole yard for about two or three months.

Q. How was that roundhouse built, by contract?

A. Yes, sir.

Q. Who was the contractor?

A. Fairbanks, Morse and Company.

Q. And you were the civil engineer that represented the rights of the railroad?

A. Yes, sir.

Q. And looked after the details and saw that it was properly built?

A. Yes, sir; and properly built.

Q. And the equipment?

A. I had nothing to do with the equipment.

Q. Was it supposed to be a turnkey job by the Fairbanks, Morse and Company people?

A. How do you mean?

Q. A completed job when turned over to the railroad?

A. The buildings, the entire amount of building on the job.

Q. I am talking about the roundhouse?

A. The roundhouse and connections with the boiler for a lump sum.

Q. A completed job?

A. With the exception that the railroad was to furnish the rails; they built the track and did the track work.

Q. The iron rails?

A. Yes, sir; and fixing the angle bars and crossties up to the track and around this turn-table they furnished the coping and furnished the table, and the Fairbanks, Morse and Company only built the pit and built the building without the tracks, they furnished all the lumber and iron that it took in raising the building, but did not furnish the rail itself.

Q. What was the last date that Fairbanks-Morse Company worked on that warehouse?

A. They completed the job, with the exception of cleaning and sweeping up, along the latter part of September, 1912.

Q. September, 1912?

A. Yes, sir.

130 Q. Whose force of hands was it working in the roundhouse on the 19th of January, 1913?

Mr. LYLES: We object as to who was working on it.

Mr. EVANS: I will withdraw it.

Q. The 19th of January was on Sunday?

A. No, sir.

Q. On Sunday?

A. No, sir.

Q. 1913?

A. Yes, sir; it was on Sunday.

Q. I believe your Honor has ruled that I cannot cross-examine him with reference to any orders or messages he received from any officer of the company?

The COURT: Yes, sir.

Mr. EVANS: That I can't do it?

The COURT: Yes, sir.

Mr. Evans:

Q. Were you there the morning Mr. Padgett was killed?
A. Yes, sir; I had my residence on the ground.
Q. Where were you that morning?
A. My car was located between the hotel and the yardmaster's office and I stayed in the car?
Q. When did you first hear or know of his death?
A. Some time that morning; I do not know just the hour.
Q. Did you attend the inquest?
A. No, sir.
Q. Did you go to where he was and see him?
A. No, sir.
Q. You did not go about him?
A. No, sir.

Mr. Lyles:

Q. Tell us whether this blue print shows the machine shop?
A. That only shows the connection of the machine shop with the roundhouse, only a portion of the wall on each side.
Q. Now, show the jury just exactly what you mean by the machine shop and roundhouse?
A. This shows three stalls of the roundhouse; it extends around here; there are ten tracks up here; here is a small building; it joins on to this wall back here about 45 feet and four inches this way and crosses here at right angles, and the thick wall of the round-
131 house is here, including about 45 feet here, and eleven feet this way. In that attitude is the boiler room, the full length of the machine shop; that is connected with the machine shop by a small door here; there is a small door in the end of the boiler room and one also at the other end; but in the machine shop they had a rolling steel door about six feet wide that went into the roundhouse, and also a small door right here; this small door was put in there as the steel door was too large and wide to be interfering with the men at work in there opening it so often, and they put in this one there, this small door, on account of the blowing in at the large one and interfering with the men in there. On the other side of the machine shop, in the middle, is another small door, but there is another large rolling door, that is on the other end of the machine shop right there; these in the machine shop are like the roundhouse, was not ceiled and above that was sheetiron covering, what we call roofing paper covered with tar.
Q. The way this map is being held, which way is Columbia?
A. The main line runs practically parallel here; it curves and goes towards Savannah this way.
Q. And Columbia is here?
A. Yes, sir.
Q. In which direction would the yardmaster's office be?
A. Over one thousand feet this way.
Q. Which way on this paper here?
A. The same direction.
Q. And the coal chute?

A. The same direction.
Q. And the water tank?
A. Same direction.
Q. Do you know where, on the night of the 11th-12th, the engineer's register book stayed?
A. The register book was supposed to stand near a large board, that is, the first in and first out engineers, we moved it a little later, but at that time it was near that door going into the boiler room in the machine shop against the wall, and they generally kept
132 small trash hanging up and I remember I got after them about it.
Q. It stayed right there in the machine shop?
A. Yes, sir.
Q. We offer this blue print in evidence. But let me ask you this, did you make that map, and what does it indicate?
A. From information furnished me by Mr. Hooper I approximated the position of the body, as Mr. Hooper helped get the body out, as he testified.
Q. And he told you the position?
A. He went right on the ground, and I asked him two or three times, and he said as close as he could remember that was the position of the body; that is approximately the length of the body, about six feet.
Mr. EVANS: When was that made?
A. This was one of my reports while the building was constructed. You will see the date on the corner. March 20, 1912.
Q. That was after the accident?
A. No, sir.
Q. Before the accident?
A. Yes, sir.

Mr. LYLES: We offer it in evidence.
(Exhibit No. 8.)

Mr. EVANS:

Q. What building is that over there?
A. The machine shop.
Q. Why did you not draw that building on here so the Court and jury could see it?
A. The sheet was not large enough.
Q. You could not get a sheet large enough?
A. Possibly so; it is shown on the other map that we have in evidence, a larger map.
Q. What is the width of that pit across there?
A. In the clear between the walls seven feet.
Q. What is the width at this small rail about six feet from the bottom, what is it there?
A. The same width.
Q. The whole way down?
A. Yes, sir.
133 Q. This is a cross section of the whole pit?
A. Yes, sir.

Q. Now, here is the iron railing running across there?
A. Yes, sir.
Q. What are they for?
A. Inner track for the jacks to take the engine wheels out and work around under there, a small track.
Q. Is it not nearer from here down that way than it is from here up?
A. No, sir; except this little rail is supported over a small pilot about one foot wide, there are four of the sides; if you will let me show you this blue print, I think I can show you; here is a cross section of the pit as shown here; this pit appears in here; we did not put them against the wall, and put four of them in there just like that; we put one here, one here, one here and one here.
Q. There are structures in there from four feet on down; what is that, is that resting on something?
A. Resting on a concrete pier.
Q. And here is another pier?
A. Yes, sir.
Q. What is the distance from this pier to this pier?
A. It shows on this map two feet four inches.
Q. From this pier down there it is four feet?
A. It is more than four feet, from the top of the rail it is five feet.
Q. It is only two feet four inches across here?
A. Yes, sir.
Q. What is it across there?
A. Two feet four inches.
Q. And in here?
A. The same thing.
Q. This is open and this is open?
A. This is open, except for this small pier; there are four piers one foot wide on each side.
Q. It is open all but four feet on each side and you have these four piers in here?
A. Yes, sir.
Q. This is open?
A. Yes, sir; absolutely.
Q. And this is what?
A. Two feet four inches.
134 Q. And Mr. Padgett was lying in the bottom of this pit? Could he lie across this way without lying across these piers?
A. Yes, sir.
Q. He could be lying two feet four inches?
A. He might not have been between the piers.
Q. If he was lying crossways of the pit?
A. There are four feet here. The body could not hit in between here, but it could here and here or here; this is seven feet from wall to wall right here.
Q. And the pit runs across the tracks this way?
A. Yes, sir.
Q. And you say Mr. Hooper gave you the information where your

line is supposed to be, supposed to be the condition or position of Mr. Padgett's body was lying?

A. Yes, sir.

Q. Across this way?

A. Yes, sir.

Q. And it was lying across this way?

A. Yes, sir; as near as he could remember.

Q. Now, I want to call the jury's attention as to the position as you make it, and in lying down his head was in this position and his feet here?

A. Let me call your attention to the fact that Mr. Hooper is not an engineer and not used to handling blue prints.

Q. You have it crossways except this way?

A. If you will also let me state, a small variation in it would bring it this way, with the feet and head in the same relative position; just swap it this way; with his feet next to the rail and his head back in here.

Mr. LYLES:

Q. The night that Mr. Padgett was killed, was there any red clay in the pit?

A. No, sir.

Q. Any rocks or stones in there?

A. No, sir.

Mr. EVANS:

Q. You say the night he was killed there was no red clay and no pieces of stone or concrete in there?

A. Yes, sir.

135 Q. Did you go in there and look?

A. Yes, sir.

Q. When did you go in there?

A. I had it cleaned out two or three days afterwards.

Mr. LYLES: We object to his bringing out what *de* did afterwards.

Mr. EVANS: I am not trying to bring it out; I asked him how he knew there was none in there, and he is stating when he went in there.

The COURT: You know what I have ruled.

Mr. EVANS: Yes, sir; and I am trying to obey it.

Q. When did you go in there before he was killed?

A. I had been in there several times.

Q. What date before he was killed?

A. I do not remember the date; I was in there probably fifty times during the construction of the job; I was in there before the concrete was being put in.

Q. How many days before Mr. Padgett was killed did you visit the pit and go in it personally?

A. I do not remember.

Q. When you heard he was killed why did you not go and inspect it?

A. Because it did not come into my department and I was trying to keep out of Court.
Q. You are here in every case that is tried?
A. No, sir; I hope not.
Q. You were here in the Moore case?
A. Yes, sir; but I never have found any pleasure in it.

H. W. PURVIS (white) sworn:

Direct examination by Mr. LYLES:

Q. You are division superintendent of the Seaboard, with headquarters at Jacksonville?
A. Yes, sir.
Q. Over what division are you superintendent?
A. The South Carolina division.
Q. Does that include the Cayce yards?
A. It does not.
Q. What part of the Cayce business does it include?
A. It includes the line between Cayce and Savannah, but
136 the handling of the Cayce yards comes under the supervision of the North Carolina Division.
Q. How about the enginemen and train crews that run between Cayce and Savannah, are they under your supervision?
A. Yes, sir.
Q. Was that true, January 12, 1913, when Mr. Padgett was killed?
A. Yes, sir.
Q. What is this (presenting paper)?
A. Time card and schedules of all regular trains operated over a certain portion of the track.
Q. State whether or not that shows the time schedule of the trains between Cayce and Savannah in January, 1913?
A. Yes, sir; it does.
Q. Were you at Cayce on the night of January 11th and morning of January 12th, 1913?
A. Yes, sir.
Q. Were you there?
A. Yes, sir.
Q. Do you know on what train Mr. Padgett came in from Savannah?
A. On No. 62, on the evening of the 11th.
Q. When did you first see Mr. Padgett?
A. I first saw him when he came into Cayce on his way to Columbia.
Q. Where were you?
A. I was in the telegraph office at Cayce.
Q. In what building is that?
A. In the yardmaster's office.
Q. Did he stop his engine there?
A. He stopped and came in to register.
Q. Did you see him after he came back from Columbia?

A. Yes, sir.
Q. Were you the highest man in authority over the transportation men at Cayce that night?
A. On the division you mean?
Q. Between Cayce and Savannah?
A. Yes, sir.
Q. From whom would orders come concerning the movements of engineers and trains between Cayce and Savannah that night?
A. Came from me.
Q. Came from you?
A. Yes, sir.
137 Q. You stated that you saw Mr. Padgett when he came back from Columbia?
A. Yes, sir.
Q. Did Mr. Padgett have a regular run at that time?
A. Yes, sir.
Q. What was his regular run?
A. Trains 62 and 59, between Savannah and Columbia.
Q. 62 from Savannah and 59 going from Cayce?
A. Yes, sir.
Q. Did Mr. Padgett have a regular engine?
A. Not at that time.
Q. What engine was he supposed to take?
A. He was supposed to take any engine that was put out for the run.
Q. Did you give Mr. Padgett any instructions that night to the effect that he was——

Mr. TIMMERMAN: That is leading, and the instructions may have been in writing.
Mr. LYLES: You can cross-examine him on that.
Mr. TIMMERMAN: That is what I want to do.

Q. Did you give him any?
A. Did I give him any?
Q. Yes?
A. No, sir.
Q. You did not?
A. No, sir.
Q. Do you know what engine Mr. Padgett came back on that night from Savannah?
A. Engine 35.
Q. Did you give Mr. Padgett any instructions concerning or to the effect——

Mr. TIMMERMAN: He has already testified on that and it is leading, and he has no right to ask it.
Mr. LYLES: I am asking the fact, did he give any instructions.
The COURT: That is a fact, whether he did or not; he is not asking what the instructions were.
Mr. LYLES: My question is this, did you give him any instructions concerning the change——

Mr. TIMMERMAN: That is what we object to; it shows that it is going to be a statement of fact.

138 The COURT: Do not lead him.

Mr. LYLES:

Q. State whether or not you told Mr. Padgett or instructed him, either in writing or orally, that he was to change his run that night.

Mr. TIMMERMAN: That is an incompetent statement, and it does that which the rule says he cannot do—tell the witness what to say.

The COURT: Let him state what he told him.

Mr. LYLES:

Q. Did you give Mr. Padgett any instructions that night about his movements?

A. I did not give him any instructions; I said to him, it is possible——

Mr. TIMMERMAN: We object to his declarations.

The COURT: Go ahead.

Mr. LYLES: That is perfectly competent.

The COURT: Go on; I ruled with you.

WITNESS: I did not give him any specific instructions; I said to him it was possible we might use his engine, the engine he came in on, on 43 that night.

Mr. LYLES:

Q. What, if anything, did you tell Mr. Padgett about his movements that night as to his run?

A. I did not say anything more about his run, any more than I stated it would be possible we might use the engine he came in on.

Q. That was what engine?

A. 35.

Q. Did you tell Mr. Padgett he would have to go on that run?

A. I did not.

Q. Did you see Engineer Radford that night?

A. Yes, sir.

Q. Do you know what train he went out on?

A. Train 43.

Q. Was that the train that earlier in the night you thought you might have to use Mr. Padgett's engine on?

A. Yes, sir.

139 Q. Did you have to use engine 35 on that run?

A. We did not.

Q. Before 43 left that night, did Mr. Padgett know that his engine was not going out on 43?

Mr. EVANS: You must answer that personally of your own knowledge as to what Mr. Padgett knew.

A. I told him in a conversation with him.

Mr. LYLES:

Q. I wish you to tell us, on the night that Mr. Padgett came in from Savannah on train 62 on the night of the 11th, tell us what his duties required him to do from the time he got back to Cayce with his engine after he had cut it off in Columbia?

Mr. TIMMERMAN: If those instructions are in writing we would like to see them.

The COURT: Are they in writing?

Mr. LYLES: What is that you hold in your hand?

A. An agreement between the enginemen and the company.

Q. Does that agreement specify the duties of the engineers?

A. It does.

Q. As to the rights of the engineers?

A. Yes, sir.

Q. Was that agreement effective covering Mr. Padgett on the night of January 11th and morning of the 12th?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Mr. EVANS: Right at this time, I do not know what it is; under the Federal Employers' Liability Act no stipulation made between engineers, or any employee of the company as to loss, relieves them of liability or of any recovery; it does not relieve the railroad company.

The COURT: I do not know what that thing is you have there.

Mr. LYLES: I asked him as to what his duties were; I just wanted to show they are in writing; we just want to call attention to
140 certain rules; we will not discuss the whole book. Now, read rule 21 on page 10?

A. "Engineers in freight service will run first in and first out of terminals, except where assigned to regular runs. Engineers will be called for their runs regardless of engines. Engineers — run around through no fault of their own, except to protect wreck trains, will be paid for trip lost."

Mr. EVANS: This rule is not applicable to this man; he was running as a passenger engineer.

The COURT: I will construe it.

Mr. LYLES:

Q. Will you read rule 22 on page 10?

A. Yes, sir. (See rule 22.)

Mr. EVANS: We submit that that rule is not applicable, as it pertains to freight engineers.

The COURT: You all put the books in and submit the books to me and I will construe it.

Mr. LYLES: Now, rule 23?

A. "Engineers will be required to take charge of their engines

thirty minutes in advance of leaving time of trains for which they are called."

Q. Now, rule 24 on page 11?

A. "Engineers will not be required to do what is known as machinist's work on their engines at terminals, relay or turn around points, except in case of emergency, and when so required they will be paid at over-time rates for such service. Engineers will not be required to fill grease cups, lubricators or put tools on or off engines at the following points: Portsmouth, Hermitage, Raleigh, Hamlet, Monroe, Abbeville, Howells, Birmingham, Columbia, Savannah, Americus, Jacksonville, Waldo and Tampa. It being understood that tools on assigned engines are placed in pool service.

Q. Does Columbia include Cayce?

A. Yes, sir.

Mr. TIMMERMAN: We object to that; the rule does not say so; the rule is written, and we stand on that rule; he cannot add to
141 it or take from it, and we object to that question and move to strike it out.

The COURT: You move to strike out that he cannot say it includes Cayce?

Mr. TIMMERMAN: Columbia is one place and Cayce another.

The COURT: Why the terminal point, the shops had been moved from Columbia to Cayce, and this rule applies to Cayce as it did to Columbia before they moved.

Mr. TIMMERMAN: They ought to produce a rule to that effect: if they have got a written rule, let them produce the record; if they have made any rule to the effect, let them show it.

Mr. LYLES: This is an agreement between the engineers and the company as to how they would operate the trains.

The COURT: It says Columbia.

Mr. TIMMERMAN: This man has testified that Columbia is in his division and that Cayce Station is in a different division, that Columbia was in some one else's division.

The COURT: Why can't he testify to that, that does not come within the writing.

Mr. TIMMERMAN: It adds to the writing.

The COURT: If that is a rule, not in writing, I am going to admit it; go on.

Mr. TIMMERMAN: He says it is in writing.

Mr. LYLES: Read rule 27.

The COURT: I can't catch what bearing it has on this case.

Mr. EVANS: It has no bearing on this case, and I can't see it myself.

Mr. Lyles: Read rule 27, page 12?

A. "Engineers will not be held responsible for engine after being relieved from duty."

142 Q. I want you to tell what were Mr. Padgett's duties from the time he got back to Cayce, brought his engine from Columbia, under those rules.

Mr. EVANS: We object most positively to that question on the ground that the rules are in writing and have been introduced in evidence, and speak for themselves and are for the Court to interpret, and my friend has no — right to construe them than Bill Jones has, as the rules have been introduced and are in writing and speak for themselves.

Mr. LYLES: I am merely trying to show what actually obtained under this rule.

The COURT: Answer the question; go ahead.

Mr. LYLES:

Q. I will change my question; how and in what manner would Mr. Padgett relieve himself from duty when he got back to Cayce?

Mr. TIMMERMAN: Here is a man that lives in Savannah and he is undertaking to tell how Mr. Padgett would do when he came into Cayce and he cannot do that and be in Savannah.

The COURT: He was at Cayce the night he was killed.

Mr. TIMMERMAN: The rule speaks for itself.

Mr. LYLES: The rule reads this way: "Engineers will not be held responsible for engine after being relieved from duty." There is nothing said in here as to what manner he shall be relieved, and I am asking how he would relieve himself from duty; on the night he was killed, this man being there, and was the highest man in charge.

The COURT: Let him testify.

Mr. TIMMERMAN: There is no proof that he was there.

Mr. LYLES: He says so.

The COURT: If he knows, let him tell it, how Mr. Padgett would relieve himself from duty when he got back to Cayce.

Mr. TIMMERMAN: We object; how does he know?

The COURT: That is what I want to find out, if he knows.

143 Mr. TIMMERMAN: How does he know?

The COURT: Go on and tell it, if you know. You testify to what you know, but do not testify to anything that you do not know of your own knowledge.

A. You want me to testify as to what I did that night, or what the rules of the company required him to do.

Mr. EVANS: The rules speak for themselves.

WITNESS: There is no rule covering that particular matter; there are special instructions.

Q. Were they in writing?

The COURT: He says they were not.

Mr. EVANS: Are not those special instructions in writing?

Mr. LYLES:

Q. Do you know Mr. Padgett's signature?

A. Yes, sir.

Q. How did the engineers on the night that Mr. Padgett came in,

on the night of January the 11th, how did the engineers relieve themselves from duty?

Mr. TIMMERMAN: We object to that; you see, they are undertaking, when they say they have got the rules and instructions in writing, to tell what this poor fellow did, who is dead.

The COURT: If they are in writing let them produce it.

Mr. TIMMERMAN: We do not know what he would say.

The COURT: Are they in writing?

Mr. TIMMERMAN:

Q. You had your general rules and special rules?
A. Yes, sir.
Q. And the general rules are covered by this book?
A. Yes, sir.
Q. And the special rules are covered by bulletins?
A. Yes, sir.
Q. And you send them out in writing?
A. Yes, sir.
Q. Where are the writings for these?
A. We have no special rules in writing.
Q. You have no special rules?
A. Not in writing.

144 Q. You mean you would go out and see each engineer personally and that there is no record in your office to show that they were given to him?

A. Not in my office.

Q. Would any other office keep a record of it, or go to each engineer separately?

A. I did not do it always.

Q. That you go out and have a man to tell them personally; will you swear that?

A. What?

Q. That these special rules, that you send a man to tell them personally instead of sending bulletins?

A. The special instructions we send them out in writing.

Q. Every rule of importance is in writing?

Mr. LYLES: The witness has testified that there was no rule in writing as to how they relieved themselves from duty at Cayce. The rule says: "Engineers will not be held responsible for engine after being relieved from duty."

The COURT: I have ruled he can testify, if there is no other writing on the subject; that rule does not explain itself.

Q. On January the 11th, 1913, was there any other rule in writing covering the manner in which engineers should relieve themselves from duty at Cayce?

A. Not that I know of.

The COURT: Not that he knows of.

Mr. LYLES:

Q. Will you please tell us the custom that prevailed there on the

part of the engineers, as to relieving themselves, and as to what they did to relieve themselves of duty.

Mr. TIMMERMAN: This man has not shown that he knows the custom. The testimony is that this man had just started, and how can you establish custom in three days?

The COURT: It is for the witness to say whether he knows it of his own knowledge.

A. The engines are cut off from the train and backed in on what we call the hostler's track, a track for the engineers to back in on and look over their engines and give it a certain amount of
145 inspection, ten or fifteen minutes, and then they go and register off duty; they go and register off duty in a book provided for that purpose.

Q. Will you come down here and show the jury the tracks that were designated as the place for leaving the engines?

Mr. EVANS: We have no objection to that, but this has been testified to several times, Mr. Garrett went all over these tracks, and it is just cumulative.

The COURT: Go ahead; both sides are making useless objections; I will state that.

Mr. LYLES:

Q. Go ahead?

A. Here is the cross over here and here is the freight yard here, and they cut off and back in on these tracks here, right by the office onto these tracks here; here is the water tank and coal chute; they stop their engines anywhere in there, anywhere they can find a convenient place.

Q. After stopping their engines on that track, what is the engineer to do?

A. Give his engine a reasonable inspection.

Q. And what is he to do next?

A. Go to the place where the engineers' register book is kept and register himself off duty.

Q. After he registers himself off duty, is he on duty any longer?

A. Not on duty any more until he is called again.

Q. He is not on duty until called again?

A. No, sir.

Q. Is the calling by the call boy a condition precedent to going on duty again after he registers off?

A. Yes, sir, by a call boy, or any one might do it.

Q. On the night of January the 11th, when Mr. Padgett got to Cayce, where was the engineers' register book kept?

A. It was located in the machine shop.

Q. In the machine shops?

A. Yes, sir.

Q. To get to the point where Mr. Padgett stopped his engine from the yardmaster's office, or any place in here—where he
146 stopped his engine—do you know where Mr. Padgett stopped his engine that night after he got back from Columbia?

A. He stopped his engine just south of yardmaster's office on the lead.

Q. Would that be right in there (indicating)?

A. Yes, sir; just beyond the yardmaster's office.

Q. To go from the point where Mr. Padgett stopped his engine after he had inspected it, to sign off on the register book, would he be called upon to go into the roundhouse?

A. No, sir; he would go through a door on the north side of the house.

Q. Would he go into any part of the building known as the roundhouse at all?

A. No, sir.

Q. Did Mr. Padgett have any duties whatever that night at Cayce, taking him into the roundhouse?

A. No, sir; not at all.

Q. State whether or not there was any duty or service owed by him to the company which could be any better performed by going into the roundhouse?

A. No, sir.

Q. Do you know how long Mr. Padgett stayed around the yardmaster's office that night?

A. He was around there until after 43 left; and train 43 left at 12:38, central time, or 1:38 eastern time.

Q. That was the last you saw of him?

A. Yes, sir.

Q. Does the Seaboard operate that hotel?

A. No, sir.

Q. Who runs it?

A. J. M. Darden.

Q. Does the Seaboard have anything to do with the running of it?

A. No, sir.

Q. How long did you stay at Cayce that night?

A. I was there from five o'clock on the afternoon of the 11th until about nine o'clock on the morning of the 12th.

Q. State whether or not you were personally directing the movement of all trains and train crews and engine crews running between Cayce and Savannah?

A. I was; yes, sir.

Q. We offer this rule book in evidence.

(Exhibit No. 9.)

147 Cross-examination by Mr. EVANS:

Q. Your headquarters are at Savannah?

A. Jacksonville.

Q. On the 12th of January, how long had you been at the Cayce yards?

A. I had been there since the afternoon of the 11th until the next morning.

Q. Since the afternoon of the 11th?

A. Yes, sir.

Q. What time in the afternoon of the 11th did you get there?
A. About five o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. That was Saturday afternoon?
A. Yes, sir.
Q. Where did you come from?
A. I came up from Jacksonville.
Q. And you left there Sunday morning about nine o'clock?
A. I said I was over at the yard at that time; I went to Columbia and then I went back to the yard.
Q. How long did you stay there?
A. I stayed there until the following Sunday morning.
Q. You were only at Cayce yards from Saturday afternoon, off and on, from five o'clock until the Sunday morning following?
A. At that particular time; I have been there a number of times before that.
Q. At that particular time?
A. Yes, sir; as well as I recall.
Q. You have head men to carry on and operate trains at that point?
A. We have men in charge of the terminal.
Q. Who are they?
A. The general yardmaster at that time.
Q. Who is he?
A. Whittaker.
Q. What authority did he have?
A. He had authority to run trains as they were ordered out of the yard.
Q. Who else did you have there?
A. We had a general foreman in charge of the mechanical department.
Q. Who was he?
A. Mr. G. W. Mudd. He was there at that time.
148 Q. Is he in Court?
A. I do not know whether he is in court; he was here yesterday.
Q. Will he be here today?
A. I do not know.
Q. Did you instruct him to come here today?
A. I did not.
Q. You had him part of the week?
A. I have not had him.
Q. The attorneys have had him here?
A. I presume they have been handling the case.
Q. And what position did he hold?
A. Foreman for the mechanical department.
Q. What authority did he have?
A. He had authority to run the engines as they were ordered.
Q. From whom?
A. He would get a call from the yardmaster or the other main office when I wanted them run.

Q. What other officer did you have there?
A. That was all that had any authority.
Q. All that had any authority in the yard?
A. The other men in the yard, of course, reported to them.
Q. What other men was it then they reported to?
A. Yard foreman.
Q. What is his name?
A. I do not know who it was.
Q. Who else?
A. The hostlers, under the supervision of the mechanical department.
Q. That was Captain Mudd's department?
A. Yes, sir.
Q. And the hostlers were the people that moved the engines for the engineers?
A. The hostlers took charge of the engines for the engineers after the engineers were relieved.
Q. Handled them while they were in the yard?
A. Yes, sir.
Q. They were under Captain Mudd?
A. Yes, sir.
Q. You also had a roundhouse foreman?
A. I think they had a foreman; Mr. Mudd was called the foreman.
Q. He had men under him?
A. Yes, sir; men that looked after the machinists' work on the engines.
149 Q. In the roundhouse?
A. Yes, sir.
Q. One in the day and one in the night?
A. I do not have anything to do with the mechanical department.
Q. They also reported to Captain Mudd?
A. Yes, sir.
Q. And were under his instructions as to the movements of engines?
A. I presume so.
Q. And the engines and trains at the yard were moved on their orders?
A. The trains were moved on orders from the division that wanted them started. The yardmaster and general foreman started them after they were ordered.
Q. Of course, while you were there temporarily, you being an officer higher over them, if you gave any special orders you would give it to the head men?
A. I would give it to the yard man.
Q. And he was supposed to carry it out?
A. Yes, sir.
Q. You never tried to over-ride your officials, but sent orders through them?
A. Yes, sir; that is correct.
Q. That is proper railroading, is it not?
A. Yes, sir.

Q. Any orders delivered from the mechanical department to the hostlers with reference to the movements of engines at the Cayce yards at that time came from the proper tribunal?

A. Yes, sir.

Q. As to the movement of engines or trains, as to their movements?

A. What do you mean by their movements?

Q. Runs?

A. The hostlers have nothing to do with ordering an engineer; he handles the engines.

Q. He would deliver any orders?

A. He would probably deliver any message that would be delivered to him to an engineer.

Q. If the hostler, on that particular night, delivered any particular order to Mr. Padgett as to the movements of his train, would it not be supposed that the hostler had the authority to deliver that message from the mechanical department?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

150 Q. You heard it testified here that there were certain orders delivered to Mr. Padgett that night as he run in from Savannah before he went into Columbia?

A. I believe I heard that statement made; there is a possibility of my being mistaken.

Q. We are all not perfect; we admit that; you say this register book was in a room adjoining this roundhouse?

A. Yes, sir; in the machine shop.

Q. And there were doors opening from the room or shop into the roundhouse and also a door opening out here?

A. Yes, sir; there was one out by there.

Q. And there were two doors opening into the roundhouse from the machine shop?

A. As well as I recall.

Q. And also a door through here?

A. Yes, sir.

Q. And the register book was kept in there, in the machine shop?

A. Yes, sir.

Q. You would not mean to say that one of your engineers running an engine over to Cayce from Savannah, that being his run, and back to Cayce from Columbia, that he would not have the right to walk through your roundhouse, do you?

A. Have the right?

Q. Yes?

A. There is no duty for him to do.

Q. Would he not have the right?

A. We would not object.

Q. Did you have any signs up there stating that if he did it he would be a trespasser?

A. That is a part handled by the mechanical department.

Q. Did you see any signs there that he would be a trespasser by going through your roundhouse?

A. No, sir; I did not.

Q. Is it not a matter of custom that your engineers, at the different roundhouses, whenever they want to, walk in and out of the roundhouses every time they want to?

A. I do not know whether that is the custom or not; you might learn that from the mechanical people.

151 Q. They do that?

A. I have never been in the Cayce shop but one time.

Q. Taking the roundhouses all over your system, do they not do it?

A. I do not know of my own personal knowledge.

Q. Have you ever seen a sign of any nature in any of your roundhouses at any place stating that one of your engineers would be a trespasser if he happened to walk through your roundhouse?

A. We have up signs, no trespassing allowed; we do not specify.

Q. You would not consider one of your engineers a trespasser who merely walked through the roundhouse where his engine was taken for repairs?

A. I do not know that we would consider him so.

Q. Why certainly not. You know something about these engines inside the roundhouse and the tracks?

A. Yes, sir; I know we have stalls in the roundhouse where we put the engines when they are to be worked on.

Q. You know the custom with reference to that, and the custom at Cayce; did you not testify to the custom at Cayce as to where they put the engines when they came in?

A. They put them on the hostler's track to be worked on by the hostlers, and if there is any mechanical work they put them in the roundhouse.

Q. Why would you not know your usual custom as to what your engineers do, and what authorities they are allowed, as to whether they are trespassers if he walked through your roundhouse where his engine was for repairs; you say he would not be a trespasser?

A. If he was one of our employees in good standing, from an official standpoint, I do not think we would consider him so.

Q. Was not Mr. Padgett a good engineer, so considered by your company?

A. Yes, sir; he was a good man.

Q. One of your best men?

A. He was an average standing.

152 Q. He could not have been in good standing at the age of 34 and been a passenger engineer, and not be a good man; you select the best men?

A. Yes, sir; our intention is to do it.

Q. By his habits and attention to business and work?

A. Yes, sir.

Q. Otherwise he could not have held it?

A. If there had been anything against him we would not have put him in passenger service.

Q. Why certainly not. During the time that you were there that Saturday night and that Sunday morning that Mr. Padgett was killed, your drop pit in the roundhouse was not covered, was it?

A. No, sir.

Q. There were no lights in the roundhouse, were there?

A. No, sir.

Q. When your engineers came in, as you testified to while ago, that they would look over their engines when they first got off to see if there was anything to be done?

A. They give it a reasonable inspection.

Q. And if there is, they report it to the mechanical department?

A. They make up a work report and place it by the register.

Q. And the mechanical department at that time, Captain Mudd at that time was at the head of it and under him was who?

A. I do not know the names of the mechanical men.

Q. If any engineer for any reason goes to a roundhouse and his engine has to be repaired, or there is anything that ought to be repaired on it, and it has not been moved out of the roundhouse at the time he gets there or goes for it, is it not usual that that engineer will go to that engine before it is taken out, and look it over and see if the repairs have been made, so it will not have to be sent back?

A. I could not say personally; I have never seen them do it.

Q. Do they not do it; a good engineer, is that not what he does?

A. I do not know.

153 Q. Do not your mechanics, if they happen to know that he is on the ground to inspect it, do not your mechanics get mad and say he should have looked it over?

A. We do not require them to inspect the engines until they are on the hostler's track to go out.

Q. I am asking you about custom?

A. I do not know.

Q. If Mr. Padgett's engine was in the roundhouse that night, and, if, by a certain statement made by him to one of the hostlers in the service, and he was directed from that conversation between him and the hostler, in the service, and he was directed to go to his engine in the roundhouse where it had been placed, would he be a tre-passer in so doing?

Mr. LYLES: That is a question of law for the Court, and he cannot answer a hypothetical legal question.

Mr. EVANS: I will withdraw it.

Q. Do or not ordinarily the engineers when they come to get their engines, usually get whatever information they want with reference to their engines from the hostlers?

A. Yes, sir; the hostlers or the roundhouse foreman.

Q. But usually the hostlers if they find them?

A. We have designated tracks on which we place them.

Q. And do they not usually act on the information that they receive from the hostlers who looks after them?

A. I do not know whether they act on it or not.

Q. It would be very natural that they would?

Mr. LYLES: That is a question for the jury.
The COURT: This is cross-examination.

Mr. EVANS:

Q. Would it not be natural for him to act on it; would you not do it, if you were in his place?
A. I expect I would.
Q. Certainly you would.

Mr. LYLES: That roundhouse, and under those tracks, it had a pit, did it not have a drop pit?
A. It had a pit.
Q. A pit running along under all of them?
A. Yes, sir.

154 Q. An engineer, after he inspected his engine on the hostler's track, does he give them in person to the hostler?
A. Not necessarily, if there is a box to be packed, or anything he writes it up on the register, and drops it in, and leaves it on his engine.
Q. Was there any work in the roundhouse at Cayce that it would have been Mr. Padgett's duty to do?
A. No, sir.
Q. Was Mr. Padgett paid anything after he registered off that night?
A. No, sir.
Q. For his services?
A. No, sir.
Q. Did your engineers have a lantern or torch or anything like that?
A. They had a white light and a red light on the engine, and a flash torch they carry in their hands for oiling the engine.
Q. When does an engineer first know what engine he is to have on his run?
A. Sometimes it is put on the call book when the information is obtainable, and he knows when the call book is sent.
Q. Does he know it before that time?
A. No, sir.
Q. When the information is not obtainable and not put in the call book when does he know?
A. He knows when he goes to the hostler's track and reports, thirty minutes before leaving time.
Q. There is no such a thing as an engineer having an engine?
A. No, sir; not exactly so; we sometimes assign men to regular engines for the convenience of the men and the convenience of the runs they are on, but the engines do not belong to the men.
Q. Do you change engines at your pleasure?
A. Whenever we saw fit.

Mr. TIMMERMAN:

Q. As a rule, you let the passenger men run their regular engines on their regular runs?
A. That is customary to do that.

155 ALEX RADFORD (white) sworn:

Direct examination by Mr. LYLES:

Q. You are now an engineer with the Seaboard?
A. Yes, sir.
Q. In January, 1913, were you working as an engineer with the Seaboard?
A. Yes, sir.
Q. How long before that had you been an engineer; how long have you been an engineer?
A. I have been running an engine between 16 and 17 years.
Q. How long with the Seaboard?
A. All my life.
Q. Were you down at Cayce on the night of January 11, 1913, when Mr. Padgett was killed?
A. I was not there when he was killed; I was there on January the 11th, but I left there, as well as I recall, at 11:39, railroad time.
Q. What number of train did you leave on?
A. Train 43.
Q. Was that your regular run at that time?
A. Yes, sir.
Q. What train did you come in on coming north?
A. 84.
Q. And you got in on the afternoon of the 11th?
A. Yes, sir.
Q. Did you see Mr. Padgett after he came back from Columbia on his engine?
A. Yes, sir.
Q. Where did you see him?
A. At the yardmaster's office.
Q. Where was he?
A. I saw him back his engine onto the hostler's track.
Q. That is one of those tracks right here by the yardmaster's office?
A. Yes, sir. It is right here.
Q. Were any of those tracks specified as to where the engineers were to leave their engines?
A. They put them anywhere to get them back in the clear between the yardmaster's office and the roundhouse; anywhere you might back them and leave them.
Q. That would be anywhere between here and here?
A. Yes, sir; between here and the yardmaster's office, just so a switch engine could get in by it; anywhere between the yardmaster's office and the roundhouse.

156 Q. You saw Mr. Padgett when he came in on his engine?
A. Yes, sir; I saw him back in.
Q. Where did he stop his engine?
A. Just to clear the yardmaster's office.
Q. What did you do?
A. I was sitting there at the office and pretty soon he came down off his engine and asked me——

Q. Do not tell what he said; did you have a conversation with him?

A. Yes, sir.

Q. What did you do after that conversation was over?

A. You mean the conversation between he and I?

Q. Yes?

A. We had lunch together.

Q. Where?

A. On a box sitting right by the yardmaster's office.

Q. Do you know what had become of Mr. Padgett's engine?

A. No, sir; it was taken back to the roundhouse or somewhere away from there.

Q. Do you happen to know who took it up there?

A. No, sir; I do not know.

Q. How long did Mr. Padgett stay with you?

A. He remained with me from the time he got off his engine and we had lunch together until I backed out to leave on 43 at 12:29 or 12:39 or something like that, as well as I remember, but he was with me from the time he got off his engine, I mean central time—he did leave me a little while and went to see if he could get a bed at the hotel, and he immediately came back, and we sat there and talked on different subjects until I backed out on the main line.

Q. Where did you get your engine that night?

A. I got it on this track, I guess you would call it south of the yardmaster's office, there is a track right near the yardmaster's office, then he backed up to the yardmaster's office and headed into the track for that purpose.

Q. Who put it in there?

A. I could not say that.

Q. Did you have anything to do with that?

A. No, sir.

Q. Did you bring that engine on 84?

A. Yes, sir.

157 Q. When you came in what was the last thing you did with that engine?

A. When I arrived at Cayce, or Columbia, you may say, the engine was cut off and backed into the hostler's track or shop track up above the yardmaster's office, and stopped; and then I got down and looked around my engine and inspected it, and made out a work report and walked up to the roundhouse and registered and hung my work report on the nail.

Q. Where was the register book then?

A. The register book was in a room adjoining the roundhouse, which is now a machinists' room.

Q. Was there any machinery in that room at that time?

A. No, sir.

Q. On which side, with reference to the yardmaster's office, would you estimate that machine shop?

A. We would walk directly from the yardmaster's office to these hostler's tracks until we came to the door that entered into the machine shop, that was the room that the register was placed in, up in

a corner of it, I do not remember which corner, but to tell you which corner I do not know; it was in a corner near the roundhouse, the extreme end from the end you entered.

Q. After you registered how would you get out?

A. Right back out the way we came in.

Q. After you did that, what further duties did you have in connection with your engine before you went out on 43?

A. Not anything at all.

Q. Was there any duty that required you to go into the roundhouse at Cayce; was there any duty in connection with your employment with the railroad that required you to go into that roundhouse at Cayce?

A. Not any whatever.

Q. Did Mr. Padgett have any business in that roundhouse.

Mr. TIMMERMAN: We object; how does he know?

The COURT: I do not see how he can testify to that.

158 Mr. LYLES: The engineers all do the same thing; it is written down in a book and we have put the book in; we are showing custom of carrying out the rules by a man who was there the night he was killed, and who has been running an engine for 16 years.

The COURT: Then you are on custom?

Mr. LYLES: Yes, sir.

The COURT: As to whether Mr. Padgett had any business; put in custom frame your question as to custom?

Mr. LYLES:

Q. State whether or not there was any custom in January at the time that Mr. Padgett was killed of engineers going into the roundhouse at Cayce?

A. If there was any I cannot imagine what it was.

Q. Did you ever go in there yourself up to that time?

A. No, sir; I had not been in the roundhouse up to that time.

Q. Had you been running a train regularly up to that time?

A. Yes, sir; since they had moved to Cayce.

Q. You had been running the same time as Mr. Padgett?

A. Yes, sir; I was there every third night.

Q. And you left there on the night that he was killed?

A. Yes, sir.

Q. And you never had been around the roundhouse to perform any duties in there?

A. Not any whatever.

Mr. TIMMERMAN: That is incompetent.

The COURT: He has answered it now.

Mr. TIMMERMAN: It does not make any difference what he did.

Mr. LYLES:

Q. Were you paid for any work from the time you signed off on the register book until you went back to work the next morning?

A. No, sir.

Mr. TIMMERMAN: What has that got to do with this case; we have no objection, but what has that got to do with this case?
159 The COURT: If you don't object, let them go on.

Mr. LYLES:

Q. Of course, you know nothing about Mr. Padgett's death?
A. No, sir; I do not.
Q. Did you see him any more alive?
A. No, sir; not after I left there that night.
Q. How long had you known Mr. Padgett?
A. I can't tell exactly how long; since he had been with the Seaboard.
Q. Several years?
A. He fired for me years ago.
Q. Were you and he good friends?
A. The best of friends.
Q. Was this agreement here between the company and the engineers in effect in January, 1913?
A. Yes, sir; that is an agreement between the engineers and the officials of the Seaboard.
Q. Were you working under them in January, 11th and 12th, 1913?
A. Yes, sir.
Q. Do you know Hostler Aldridge at Cayce?
A. Yes, sir.
Q. Do you know Hostler Horsford?
A. Yes, sir.
Q. Is it proper to call a hostler an engineer?
A. No, sir.
Q. Are they engineers?
A. No, sir.
Q. Have they any control over the engineers or any right to direct their services?
A. No, sir; nothing other than to get the engines ready to go out on the runs.
Q. Has a hostler any right to give you instructions?
A. Not any whatever.
Q. Who do you get your instructions from?
A. From the mechanical department, the master mechanic or general foreman.
Q. And the transportation department?
A. The superintendent.
Q. What was the rule as to the engineers—what was the rule January the 11th and 12th, 1913, as to engineers having any particular engine?
A. There is no rule as to them having a particular engine; the company sometimes furnishes him with an engine for sev-
160 eral trips, or maybe longer than that, or they would assign an engine to a man as long as he could keep the engine, or something, but when the company sees fit to take up the engine from the engineer and place it on another run; the engines have

nothing to do with the men; the engines belong to the company and the runs belong to the men.

Cross-examination by Mr. EVANS:

Q. Are you a passenger engineer?
A. Yes, sir.
Q. What salary do you make a month?

Mr. LYLES: I do not think they can prove another man's salary by proving what this man makes.

Mr. EVANS:

Q. You are a passenger engineer?
A. Yes, sir.
Q. And Lewis H. Padgett was a passenger engineer?
A. Yes, sir.
Q. And both run between Columbia and Savannah?
A. Mr. Padgett, at the time he was killed, ran between Savannah and Columbia, but I run between Columbia and Savannah and Savannah and Jacksonville.
Q. You just changed your runs?
A. No, sir; I would make one trip to Columbia and back to Savannah, and then to Jacksonville.
Q. What was your average salary per month?

The COURT: I am not going to make him answer that.
Mr. LYLES: They were paid by mileage.

Mr. EVANS:

Q. What is the mileage between Columbia and Savannah?
A. 142 miles.
Q. What does a passenger engineer get per mile?
A. They are all rated accordingly, with exception to the different sizes of the engines, but Mr. Padgett, at the time he was killed, he was a passenger engineer and I suppose he only made one trip a day, he would come up from Savannah today and get back in the morning.

161 Q. What did he get per mile?
A. I don't remember just what the scale was now. Anyway, I think——
Q. It was the same thing now it was then?
A. No, sir; it is different.
Q. What was it then, if you were making the same run every day?
A. The run paid at that time something like six dollars a run, as well as I remember, six dollars, or maybe six dollars and a little over, this way.
Q. He made one trip a day?
A. Yes, sir; the run he was on allowed him that.
Q. Thirty days in a month, and six dollars a day would be $180.00 a month?
A. Yes, sir.
Q. How much per hour does an engineer make for working overtime?

A. I am pretty sure it is forty cents an hour for overtime.
Q. If Mr. Padgett was delayed on any of those runs he would get forty cents an hour?
A. There is a specified time; the runs were based at 20 miles per hour, after a certain number of hours, then his overtime would start; he would have been delayed quite a while before his overtime would start.
Q. Engineers usually make overtime every month, do they not?
A. No, sir.
Q. They do not?
A. No, sir; I can speak for myself; I do not know the day I have made an hour's overtime.
Q. What time was Mr. Padgett due here?
A. I do not remember just the hour.
Q. What time was his train due here every day?
A. That means the same thing, does it not; they both had to get here together.
Q. Do you know that Mr. Padgett was continually making an overtime of one hour?
A. I do not know.
Q. Do you know his writing?
A. Yes, sir.
Q. How much is that?
A. I presume that "H" to mean one hour.
162 Q. On the 9th overtime claimed is one hour?
A. Yes, sir.
Q. You say he got 40 cents an hour overtime?
A. I think so.
Q. Overtime claimed on the 8th 1 H., one hour?
A. Yes, sir.
Q. And on the 7th, 1 H., one hour overtime claimed?
A. Yes, sir.
Q. And on the 6th overtime claimed, 1 H., one hour?
A. Yes, sir.
Q. And on the 5th, overtime claimed, 1 H., one hour?
A. Yes, sir.
Q. And on the 4th, overtime, none?
A. Trains 62 and 65.
Q. On January the 3rd you see 9 here, what does that mean?
A. There is no hour there; I do not know what that is.
Q. There is no H there; would he claim 9 minutes?
A. No, sir.
Q. So, if that 9 represents anything, it must be 9 hours?
A. I cannot say what it represents.
Q. What train was he running that day?
A. Extra.
Q. Engine what?
A. No. 783.
Q. Left Columbia when?
A. 10:15.
Q. Arrived Estill when?
A. 12:30 1-4.

Q. Relieved at what time?
A. 2:15 p. m.
Q. Mileage?
A. 102.
Q. Overtime?
A. It looks like a 9.
Q. If it is 9 minutes, you say he would not have claimed 9 minutes?
A. No, sir.
Q. And the second overtime claimed down there; what train is that?
A. 28.
Q. And the first overtime claim, 1 H?
A. Yes, sir; that was train extra 780, Jacksonville to Savannah.
Q. The first time overtime appears here is when?
A. 1/21, engine 780.
Q. On Dec. 31, 1912, overtime, none?
A. None.
163 Q. On the 30th overtime claim, 1 H. and 15 minutes; that is one hour and 15 minutes?
A. Yes, sir.
Q. On the 29th overtime, none?
A. Yes, sir.
Q. And on the 28th?
A. You are in freight service now; I can refer back to 59 and 62 and you will come to the passenger runs; all of that is freight runs, extras, and things like that.
Q. This shows that Mr. Padgett did make considerable overtime?
A. In freight service it does; I do not remember when we went into the passenger service; look for 59 and 62; here is the first passenger run, 1 and 5, I think, there is not any back this way, 1 and 5 here.
Q. On the 5th one hour overtime?
A. Yes, sir.
Q. On the 6th, one hour overtime?
A. Yes, sir.
Q. On the 7th, one hour overtime?
A. Yes, sir.
Q. On the 8th, the same?
A. Yes, sir.
Q. On the 9th, the same?
A. Yes sir.
Q. On the 10th, the same?
A. Yes, sir.
Q. And on the 11th?
A. It looks like it is scratched out; we can't tell what it is.
Q. That shows that during the time he was in the passenger service that he practically made overtime for six days?
A. Speaking about the engineers, if you will permit me, I will explain that to you, as to that overtime, I have run the same run myself; that overtime was not made between terminals; there is a

clause that allows an engineer one hour overtime for switching and handling his engine around terminals.

Q. Such as at Cayce?

A. Not at Cayce, but at Columbia in the old park yard; he made an hour overtime taking his train around the Y at the park yard, which was allowed to him, according to the agreement.

Q. That shows that he was making $180.00 a month, and practically an hour overtime every day he was there?

A. Yes, sir.

164 Q. And he was getting 40 cents an hour overtime, as to the overtime by the rule we have in evidence?

A. I do not remember what it was.

Q. The rule says fifty cents per hour?

A. That only applies to work trains.

Q. Forty cents a day for thirty days would be $12.00, and that added to $180.00 would make $192.00?

A. Yes, sir.

Q. An average of $192.00 a month?

A. Yes, sir.

Q. And that is what the record shows at the time Mr. Padgett was killed that that is what he was making?

A. Yes, sir; that is correct.

Q. In actual money?

A. Yes, sir; it was money.

Q. Where was the register over at Cayce located with reference to the roundhouse?

A. If you will get me that map I will point it out to you.

Q. Where is the register now—in the roundhouse?

A. At present it is.

Q. Is that not the proper place for the register?

Mr. LYLES: We object to him going into that; he asked if it is not in the roundhouse now, and he asked if that is not a proper place for it.

Mr. EVANS: It bears on this, as to whether or not an engineer has a right in the roundhouse; they allege that he was a trespasser at the time of this accident, they did not have the register in the roundhouse at the proper place where it ordinarily was, but they had it in this boiler room and doors open on the outside; that being true, but it goes to show that engineers and enginemen have a right in the roundhouse, for that is the place he has got to go and register when he comes in off his run.

The COURT: I see your position. You are on the defense of trespasser; this is on cross-examination and I think it is proper; go on and ask the question.

Mr. EVANS:

165 Q. I want to connect that with the amount he was making per month. Now, look at rule 9 on page 6 of the schedule of rates, rules and regulations for engineers, between the engineers and the Seaboard, at the top of the page, and see what they have to say?

A. "Overtime for passenger service, 60 cents per hour. Overtime for through freight and mixed trains service, engines less than 22-inch cylinders, 57 cents per hour; engines 22-inch cylinder and over——

Q. That is what we want, the overtime for passenger service is 60 cents per hour instead of 40 cents; if we figured 60 cents an hour it would be $18.00 a month instead of $12.00 a month, and $18.00 added to $180.00 would be $198.00 per month. Now, to go back to the proper place for the register. State whether or not the proper place for the register for enginemen to register off and on when they come to terminals with their engines, if the proper place is not within the roundhouse?

A. I can answer the question in this way; it was placed in the engine room and machinist's room at that time.

Q. Has it been moved?

A. It has been moved.

Q. Into the roundhouse?

A. Yes, sir; into the roundhouse.

The COURT: Where is that engine room?

WITNESS: Adjoining the roundhouse.

Mr. EVANS:

Q. And it had two doors opening into the roundhouse?

A. Yes, sir.

Q. And one door opening out on the other side?

A. Yes, sir.

Q. When you got to your terminal at Cayce to register off you go into the roundhouse to register off and register on?

A. I do not at present, and have not been for a good long time, six or eight months; I am in the passenger service; we change at Columbia passenger station.

166 Q. And you do not have to register at Cayce?

A. No, sir.

Q. Do you not know as a fact that what engines they do run into the roundhouse at Cayce that you go and register?

A. Yes, sir.

Q. It has been alleged by the railroad that Mr. Padgett, on the night he was killed, was a trespasser in going into that roundhouse at Cayce.

Mr. LYLES: That is a question of law; let him ask the facts as to custom.

Mr. EVANS:

Q. If an engineer, at a terminal, where his engine is, and where he has left it, such as Cayce, is an engineer a trespasser for going into the roundhouse?

Mr. LYLES: We object.

Mr. EVANS:

Q. Has an engineer the right to go in and out of a roundhouse;

has he a right to go in and out of a roundhouse or terminal like Cayce, at a roundhouse like Cayce?

A. Has he a right?

Q. Yes, sir; has he a right?

A. As I said, as I say, I do it he goes in there to register.

Q. Answer that question directly; all I want you to do is to tell the truth?

A. I do not want to tell anything but the truth.

Q. Now, answer it yes or no; has an engineer the right to go into a roundhouse?

Mr. LYLES: That should be limited.

The COURT: That is what we are talking about.

Mr. EVANS:

Q. I ask you on your oath, as a man, of your own knowledge of engineers, as their custom, has he a right?

A. Well——

Q. Answer yes or no.

A. I would say yes.

Q. Certainly you can say yes?

A. I would.

167 Q. You get your messages from the mechanical department, your orders?

A. You mean train orders, or what?

Q. General orders as to the movement of your trains; do they not come from the mechanical department?

A. After we leave the roundhouse we are under the superintendent.

Q. If there are certain things that the mechanical department want you to do,—the mechanical department has the movement of the engines, and so on?

A. Yes, sir.

Q. If the master mechanic, or the mechanical department, wanted you to do certain things with reference to your engine or do something, would you not get your messages from him, from that department?

A. No, sir; not from the mechanical department, is the way I understand your question; I cannot move my engine after I leave the roundhouse without instructions from the superintendent.

Q. Suppose the master mechanic over there, and Mr. Purvis testified that he had charge of the movements there, wanted you to take your engine to a certain place, would you not get your message from that department, would it not come down to you through some line of agents?

A. If I were to get a message how?

Q. For instance, from Captain Mudd's department?

A. Now, what is the question?

Q. Would you not get your orders from him; suppose that he was there in charge on that department now, Captain Mudd; Mr. Purvis' headquarters were in Jacksonville, Florida?

A. That is true, but he held authority, and has the right to move engines whenever he sees fit.

Q. And that has never been denied; if Mr. Purvis wanted an order carried out, as he has just testified, that he would deliver it to the one that was the head of that department to have it done?

A. Yes, sir.

Q. And he said if he wanted an order through the mechanical department he would have it done?

A. Yes, sir.

168 Q. And if to one, of course, it would be carried out?

A. Yes, sir; the message should be delivered to us by the mechanical department.

Q. And it would come down through some agent or officer by the mechanical department and would be sent to you?

A. Yes, sir.

Q. Are not the hostlers under the mechanical department?

A. Directly.

Q. If a message was sent from Captain Mudd through one of the hostlers to you, would you not feel it was your duty to obey that order?

A. Yes, sir; most assuredly.

Q. Mr. Padgett was what kind of a man or engineer was he?

A. In what do you mean?

Q. Was he a good man or a bad man, or a good engineer?

A. I considered him a good engineer.

Q. Did you not consider him a first-class man?

A. I did.

Q. At the time Mr. Padgett was killed over there; state whether or not the drop pit was covered at that time?

A. It was not covered.

Q. State whether or not there were lights in the roundhouse?

A. No, sir; there were no lights in the roundhouse.

Mr. LYLES:

Q. You said that was Padgett's writing?

A. Yes, sir.

Q. What trip does that slip cover?

A. Train 62.

Q. On what date?

A. 1-11.

Q. Was that the last trip he made?

A. Yes, sir.

Q. What time did he mark himself as having been relieved?

A. Relieved, it does not say; it has been here, but has been rubbed out.

Q. That is his writing?

A. Yes, sir.

Q. That is the slip you make out on which you get your time?

A. We make out both slips and turn this one in to the master mechanic's office; we keep this for future reference.

169 Q. Would that show the same time relieved as this one?
A. It should.
Q. And this is Mr. Padgett's writing?
A. Yes, sir.

Q. We offer this in evidence.
Mr. EVANS: This is my book and I will introduce it when I get ready.
Mr. LYLES: I have a right to examine the witness on it and now I want it to go into the possession of the Court.
Mr. EVANS: I wish to put the whole book in.
The COURT: Put the whole book in.
(Exhibit No. 10.)

Mr. LYLES:

Q. Later on, when that book was put in the roundhouse, where was it put?
A. This book was placed to the right just inside of the roundhouse.
Q. Where would that be; here is the door here?
A. You enter this door and turn to your right and right by the corner is where the register book is. You enter the machine shop and the register book has been placed to come through this door; it is up here in this corner right here; that is where the register book was the last time I was at Cayce.
Q. After it was changed and put in the roundhouse, would you go anywhere in the neighborhood of the drop pit?
A. No, sir.
Q. In coming back from the register book, would you go near the drop pit?
A. No, sir; I would come back here and come back the way I come in.
Q. And the drop pit is over the other track?
A. Yes, sir; those are stalls; there is a whole lot of them in here.

Mr. EVANS:

Q. I would like for you to locate those places on this plat; that is the turn-table?
A. Yes, sir.
Q. Here is the back of the roundhouse where you run your engines in here?
A. Yes, sir.
170 Q. Now, locate where that pit is?
A. That pit is here; this is the outside of the roundhouse.
Q. This is the outside of the roundhouse here; you say these are pits along here?
A. You have not got the machinist's room here.
Q. The machinist's room would be back over here?
A. Yes, sir; it would be back along here; the machinist's room is like that; it is up along here; this entry would be here; you enter the machinist's room here, and here is the big door here and a door there, and you enter here; now, you are going into the roundhouse.

the register book is right here in this corner, and all you have to do is to walk to this door here, turn to your right and there is the desk for the bulletin books and your work reports.

Q. Here is the end of this wall?

A. If this is the roundhouse.

Q. And here is the first track and here is the first post?

A. Yes, sir.

Q. And here is the second track and here is the second post?

A. Yes, sir.

Q. All of these run to the turn-table and the engines are carried to the other tracks for this table here?

A. You bring the engines out on it and turn around on this track here, but there are others at the freight yard; this is the hostler's track, where they take the passenger engines in and out.

Q. Where would that place the hostler's track?

A. They bring them on the hostler's track and they come into the clinker pit and water tank and coal chute and sand house, and they bring them up further right here, and they put them on this track provided for the purpose.

Q. An engineer coming up here to register in this corner can either come in at this door or come in here at this corner?

A. He could, if he was a mind to walk the distance of the roundhouse and walk it twice?

171 Q. This is a good-sized room, this machine —?

A. Yes, sir; it is a good big room.

Mr. LYLES:

Q. They always get off their engines up towards the yard office?

A. Yes, sir; I have always myself, and I think the others do.

F. S. FREEMAN (white) sworn:

Direct examination by Mr. LYLES:

Q. Are you an engineer in the employ of the Seaboard?

A. Yes, sir.

Q. Were you in the employ of the Seaboard January 11th-12th, 1913?

A. Yes, sir.

Q. Were you at Cayce on the night of January the 11th and morning of the 12th?

A. Yes, sir.

Q. What run did you have then?

A. I had a freight run between Savannah and Cayce.

Q. Do you recall seeing Mr. Padgett that night?

A. Yes, sir.

Q. Do you remember what train you came in on the 11th to Cayce?

A. I came in on an extra.

Q. What was the number of that extra?

A. Extra No. 67.

Q. What was the engine number?

A. Engine 67.

Q. Where did you come from?
A. From Savannah.
Q. Is that your register there?
A. Yes, sir.
Q. What does it read?
A. 11th January, extra train 67, Freeman and Kerse.
Q. Do you recognize that (presenting same)? Do you know whose handwriting that is?
A. Mr. Lewis H. Padgett's.
Q. What does that read?
A. January 11, train 62, engine 35, time registered off 10:30, Padgett, McDonald.
Q. Where was that register book kept on the night of the 11th?
A. In the machine shop.
172 Q. Do you remember how long after that time it was moved into the roundhouse?
A. No, sir; I do not know.
Q. Were there any tracks there that were specified as the tracks to leave engines on when they came in off their runs?
A. Yes, sir; the ash pit track where they clean the fires.
Q. Why did the engineers leave their engines there?
A. At that time the whole yard was blocked; in any tracks around the yard office.
Q. Do the engineers take their engines up to the roundhouse?
A. They take them to the ash bed.
Q. To the ash bed?
A. Yes, sir.
Q. Those tracks lead up to the roundhouse?
A. Yes, sir.
Q. When Mr. Padgett came in there on the night of the 11th on 59 then what was he to do with his engine, when he came back from Columbia on his engine?
A. All he had to do was to get it off the main line and leave it so the switch engine could get in there.
Q. Show us approximately where he should have left his engine; here is the yardmaster's office; now show us where he should have left his engine?
A. On any of those tracks in there.
Q. Was he to take his engine up there?
A. As far as is necessary for him to take it was to the ash bed; the engineers would take them up to the ash bed and place them after they bring them in the yard on any of those tracks, is all right.
Q. If Mr. Padgett signed off at 10:30 P. M., when would he be in service again after that?
A. Thirty minutes before the leaving time of his train.
Q. Thirty minutes before the leaving time of his train?
A. Yes, sir.
Q. Do you know his run?
A. 62 and 59.
Q. What time did 59 leave?

A. 6:10 A. M. left Cayce.

Q. That is what time by our time?

A. 7:10 A. M.

173 Q. If Mr. Padgett registered off at 10:30 he was not on duty until 30 minutes before 6:10?

A. It was due to leave at 6:10; that would put him on duty at 5:40 the next morning.

Q. What was the rule of the engineers as to certain engines, or using certain engines that were given them?

A. It was customary that the men in the passenger service are assigned to regular engines when it is convenient for the company to do it, but if they have not got the engines, and if it is necessary to run the engine on another run, they take the engine, regardless of the men, and when the man goes on his run he has another engine.

Q. The engines belong to the Company and the runs belong to the men?

A. Yes, sir.

Q. Had Mr. Padgett been using engine 67 regularly on his run?

A. I do not know that he ever used it.

Q. But you know he did not use it on the 11th?

A. Yes, sir.

Q. On the night of the 11th have you testified where the register book was?

A. I think I told you it was in the machine shop.

Q. If Mr. Padgett left his engine in the direction of the yardmaster's office, to get into the machine shop, would he have to go through the roundhouse?

A. No, sir; not necessarily.

Q. Would it not be considerably out of his way to do it?

A. Yes, sir.

Q. What would be the most convenient way to go from the yardmaster's office to where that register book was that night?

A. Walk right south to the road, right straight from the yard office to the roundhouse and machine shop would be the first place he would get to, and right in there was the register book.

Q. How would he get back?

A. Come back the same way.

Q. If you went into the roundhouse how much further
174 would you have to walk?

A. You would have to walk a considerable distance further and it is not necessary.

Q. After the book was changed into the roundhouse, after Mr. Padgett was killed, do you know where it was located?

A. Yes, sir.

Q. Will you show us on this plat?

A. Right here, right in this corner.

Q. To get in there from where the engineers leave their engines how would you get in there?

A. Always come through the machine shop; if not, you would

have to walk the full length of the machine shop and back up here to the pit, where you would have to go about 900 feet to register off.

Q. When Mr. Padgett got through with his engine that night what further duties had he?

A. To inspect his engine, go to the roundhouse, register on this book, and make out his work report.

Q. Where would he put his work report?

A. There was a box or trough to hang the reports on.

Q. At the same place?

A. Yes, sir.

Q. Was there a light there?

A. There was a light there that night.

Q. What did he do then; did he have any further duties as an engineer, or owe any further service to the company until he was called for duty again?

A. No, sir.

Q. Did he have any business to perform for the company in the roundhouse?

A. Not a bit.

Q. Was there any reason, in connection with his duties for him to go in the roundhouse?

A. No, sir.

Q. Have you ever had any dealings carrying you into the roundhouse in connection with your engine?

A. Not until after I make out my work report; my time is over at that time.

Q. Do you get pay for anything after you register off until you are called for duty again?

A. I do not.

175 Q. Did Mr. Padgett?

A. Not that I know of.

Q. Where did you see Mr. Padgett that night?

A. After I had registered off, I went down to the yard office, and I was talking to Mr. Purvis in the yard office and I noticed Mr. Padgett and Mr. Radford on the outside; Radford was getting ready to go out on 43, and I stayed until Mr. Radford got on his engine and backed it out; the train was coming then.

Q. What did you do?

A. I talked with Mr. Padgett and asked what he was going to do.

Q. Did you talk further with Mr. Padgett?

A. After Mr. Radford left.

Q. In consequence of that conversation did he go anywhere?

A. We went over to the hotel.

Q. What did you do there?

A. I got something to eat, and Mr. Padgett said he had had lunch.

Q. Do not tell that; did he eat with you?

A. No, sir.

Q. Did he stay while you were eating?

A. Yes, sir.

Q. And you talked during that time?

A. Yes, sir.

Q. What did you do then?
A. I went to bed.
Q. Did you go into another room other than the room you were eating in?
A. Yes, sir.
Q. You went in a bed room at the hotel?
A. Yes, sir.
Q. Did Mr. Padgett go to bed there with you?
A. No, sir.
Q. He left you where?
A. I left him; there is a kind of porch or hallway between the residence part and the sleeping rooms and we left him out there in the hallway.
Q. Did he tell you what he was going to do?
A. Yes, sir.
Q. Do not say what; who runs that hotel there?
A. Mr. Darden.
Q. At that time?
A. Yes, sir.
Q. Did the Seaboard run it?
A. Not to my knowledge they did not.
Q. When did you go out again?
A. I think I left there some time Sunday; Sunday morning.
176 Q. Where are the engines placed there to go out on the runs to leave Cayce on their runs, on what tracks?
A. They were brought back down to the yard office and placed on one of these tracks there.
Q. Who brought them down?
A. The hostlers.
Q. If the engine was put in the roundhouse, did the engineer have anything to do with that while it was there?
A. No, sir.
Q. Who worked on it in the roundhouse, if there was anything to do on it?
A. The machinists.
Q. Who carried the engines to and from the roundhouse?
A. The hostlers.
Q. Do you remember what hostlers were on duty?
A. No, sir.
Q. Do you know Hostler Aldridge?
A. I cannot say I knew him at that time. I knew him since we have been here.
Q. Do you remember Hostler Horsford? Did you see Bevill that night?
A. No, sir; I do not remember.
Q. Is a hostler an engineer?
A. No, sir.

Q. We offer this time table in evidence.
(Exhibit No. 11.)
The COURT: It is now 1:30. Be back in your seats at 3:00 o'clock.

Afternoon Session, Feb. 11, 1914.

F. S. FREEMAN, recalled:

Direct examination by Mr. LYLES:

Q. There has been something said in this case on the question of custom, as to whether a custom existed at Cayce on the night that Mr. Padgett was killed—the night of the 11th and morning of the 12th—as to engineers going into the roundhouse where the tracks are; I wish you would tell the jury whether or not there was any such custom?

A. It was not customary for an engineer, after he inspected his engine and went to the roundhouse and made out his work report and registered off, he was off duty.

177 Q. Where would he register off and leave his work report?

A. Register off in a register book for that purpose.

Q. Where was that book at that time?

A. In the machine shop and hang up his work report; there was a box to drop the work reports in at that time; in the machine shop right at the register book.

Q. Go on?

A. And after that he was off duty, and it was not necessary and it was not customary for men to lie around the roundhouse or go in the roundhouse after he had made out that report, he was free to go where he pleased until the call boy called him to go out on his run, wherever that may be.

Q. Between the time he registered off and the time the call boy called him, was he under any instructions from the road?

A. Not any.

Q. Was it compulsory for the engineers to stay when they were off duty at the hotel in Cayce or any other place?

A. They could go back to Columbia if they wanted to.

Q. After Mr. Padgett registered off, state if he could have gone to Columbia or anywhere else?

A. He could have gone to Columbia or stayed at Cayce; he could suit himself on that.

Cross-examination by Mr. EVANS:

Q. You are an engineer?
A. Yes, sir.
Q. How old are you?
A. 39.
Q. 39?
A. Yes, sir.
Q. Just my age; what month were you born in?
A. June 27.
Q. How long have you been running an engine?
A. I do not know the exact number of years.
Q. You ought to know?
A. I could not come right at it.
Q. I will ask you to refresh your memory and give us an opinion?

A. I will say 12 years.

178 Q. How long have you run as a freight engineer?

A. I have been on a freight ever since I have been running.

Q. And you are 39 years old and have never been promoted to a passenger run?

A. We get our promotion by seniority.

Q. Answer it yes or no?

A. According to our seniority on the road.

Q. I asked you the question whether you had ever been promoted to a passenger run, an engineer running on a passenger train and running a passenger engine; have you ever been promoted?

A. I cannot answer your question that way.

Q. It is very plain?

A. I understand what you are trying to get at.

Q. If you understood it you should certainly be capable of answering it?

A. If you will let me explain.

Q. You answer that question?

A. I have never run it regularly.

Q. You have never been promoted to a passenger engineer, have you?

A. No, sir.

Q. That is correct; you could have got that out five minutes ago; yet you are five years older than Mr. Padgett was when he was promoted to a passenger engineer?

A. Yes, sir.

Q. At the time of his death?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Did you hear Mr. Purvis testify that engineers were promoted according to their capability?

A. I heard him make the remark.

Q. You heard that?

A. Yes, sir.

Q. And according to their ability to run engines?

A. Yes, sir.

Q. And that is harder than a man running as a freight engineer?

A. Yes, sir.

Q. And he is in what position?

A. Superintendent.

179 Q. Superintendent of this division with headquarters at Jacksonville, over you all?

A. Yes, sir.

Q. You heard him testify that Mr. Padgett was an experienced man?

A. Yes, sir.

Q. In every respect?

A. Yes, sir.

Q. An excellent man?

A. Yes, sir.

Q. Now, the question I am going to ask you I am asking not because I am under oath, but that you are under oath to tell the truth, and nothing but the truth, and the truth as you know it, and to answer my question- yes or no, and not to try to get around it and answer them briefly; and I want you to have that in view with the questions I am going to ask you. You stated this morning on examination in chief that an engineer was not on duty until 30 minutes before the leaving time of his train?

A. Yes, sir.

Q. How long, according to your rules, is an engineer called before leaving time?

A. At different terminals at different times.

Q. Suppose we take Cayce, the point in question here, where this accident occurred?

A. They called us from one hour.

Q. How long was a passenger engineer called before he went on duty?

—. From one hour to one hour and fifteen minutes.

Q. What does your rule require?

A. It requires from one hour to one hour and a half, if I am not mistaken.

Q. I will be glad to give you this rule book introduced by your attorneys as to the agreement between the Seaboard and the engineers, and I will help you to take that book and hold it and refresh your memory?

A. It is not mentioned in here.

Q. It is in one of those rules; you ought to be familiar with that book?

A. I am to a certain extent.

Q. I will give you plenty of time to go through it. Read that (indicating)?

A. "Rule 22. Engineers will be called one hour and 15
180 minutes before leaving time of the train they are to take out, except at the following points: Portsmouth, one hour and 30 minutes; Abbeville, for those living beyond Cothran's Branch, one hour and 30 minutes; Birmingham, Savannah, Jacksonville, freight men, two hours; Howells, freight men, Birmingham district, two hours. The *calls* will be provided with a book showing the time for which crew is called, in which engineer will register his name and time called."

Q. Do you mean to tell the Court and jury that an engineer was not on duty from the time he was called?

A. No, sir; he was not.

Q. You will stick to that?

A. Yes, sir.

Q. That is what I want you to say; who does the call boy represent?

A. He represents an agent.

Q. Who does the agent represent?

A. An agent, or call boy, represents an agent, there is an agent

between the yardmaster and the roundhouse foreman, the roundhouse foreman and the engineer.

Q. Who does that procession represent?

A. They represent the superintendent of the railroad.

Q. Who does the superintendent represent?

A. He is working under the general manager above him.

Q. Who does the general manager and the officers above him represent?

A. They represent the railroad.

Q. Why did you not say the railroad in the beginning; you knew it; that is the only way a railroad can run, and through its agents and officers and employees?

A. Yes, sir.

Q. And it could not run otherwise, could it?

A. It would have to have men to run it.

Q. You knew that in the beginning?

The COURT: He answered that question every time you asked it.

Mr. EVANS: I had to press him very hard and thorough to get it.

181 A. I did not understand what you were trying to get at.

Q. You look to be an intelligent enough man?

A. That may be true, but the way you put that question at me.

Q. How many years did you go to school?

A. I could not tell you that; I went several years, but I do not know the exact number of years.

Q. You have got an ordinary education?

A. I think I have a pretty fair education.

Q. Just as I said, I have sized you up as being a man of intelligence. Your contention is that an engineer was not on duty until 30 minutes before leaving time?

A. That is right.

Q. Yet, the call boy that you finally said represented the railroad, called him one hour and fifteen minutes before leaving time?

A. Yes, sir.

Q. Your contention is that he was not on duty from the time he was called until 30 minutes before leaving time?

A. Yes, sir.

Q. Suppose your train for some reason was due to leave at 6:00 o'clock, but you got orders that the train should not leave until 8:00 o'clock, you would not be on duty until 30 minutes before 8:00?

A. If I understood you right, if the train was to leave at 6:00 o'clock is that the question?

Q. No, sir; that is not the question I asked you, and I think you understood that question.

The COURT: I understood you that way, and that he got orders not to leave until 8:00 o'clock.

Q. That he would not be on duty until 30 minutes before eight?

The COURT: But if he had to go on duty, if his car was to leave at six.

Mr. EVANS: If he got orders that the car would not leave until eight o'clock, that he would not be on duty until 30 minutes before eight.

A. If he was called for the train to leave at eight o'clock.

182 Mr. LYLES: The witness is entitled to understand the question.

The COURT: Let him understand it.

WITNESS: The train was called to leave at 6:00 o'clock.

Mr. EVANS: He is not answering my question.

The COURT: That is the way I understood it.

Mr. EVANS: He says the engineer was not on duty until 30 minutes before leaving time.

The COURT: That is the regular leaving time, and that you got orders not to leave until eight o'clock.

Mr. EVANS:

Q. Good; if that man got orders to leave at 6:00 o'clock he was on duty at 5:30, and your contention is that he was not on duty from the time he was called by the call boy?

A. Thirty minutes before leaving time.

Q. Answer my question?

A. No, sir; he was not.

Q. Your contention is that when the call boy called him one hour and fifteen minutes before leaving time that he was not on duty at that time?

A. Yes, sir.

Q. That is exactly what I wanted you to say some time ago. On this particular morning Mr. Padgett would have been on duty at 5:40?

A. To leave at 6:10, yes, sir; at 5:40 he was on duty.

Q. Turn there to where Mr. Padgett registered on the 11th when he came in, and read everything on that line?

A. Jan. 11, train 62, engine 35, registered at 10:30, Padgett, McDonald.

Q. Read the whole line?

A. That is all there is on this line.

Q. In whose handwriting is that?

A. Mr. Padgett's.

Q. You are quite familiar with it?

A. His figures out here, I cannot say.

Q. Are you familiar with those figures, as to who made those figures?

A. No, sir; I am not.

183 Q. You do not know who put those figures there?

A. No, sir.

Q. What figures do you have reference to?

A. 62, 35, 10:30.

Q. You are not familiar with those figures?

A. No, sir.

Q. Are those figures in the same handwriting as the name Padgett?

A. I cannot say.

Q. Look at them and see; you are an intelligent man; now look at them and say from your opinion, you have got them before you?
A. I could not say that that is Mr. Padgett's figures there at all.
Q. Were they made by the same person who wrote the name?
A. I do not know.
Q. Does it look like they were made by the same person?
A. It looks like the same pencil.
Q. There are thousands of pencils of the same kind; I am talking about the writing?
A. It seems to be an indelible pencil that wrote the name and wrote the figures.
Q. You were quite familiar with Mr. Padgett's writing?
A. Yes, sir.
Q. What are the figures?
A. 62, 35, and 10:30.
Q. But you will not swear that they were made by the same man that wrote Padgett?
A. No, sir.
Q. And yet Padgett is written in Padgett's own handwriting?
A. Yes, sir.
Q. I hand you Mr. Padgett's time book in which his time was kept on the same date, and ask you to read what is on this, begin at the top and read the whole thing?
A. No. 12, 1-11-13, train 62, engine 67, left Savannah 3:30 p. m., engine 67, 1-11-13.
Q. What else, read it all?
A. Arrived—I do not know what that is, it looks like La. 9 P. 1-11-13.
Q. Read the balance there?
A. That has been erased.
Q. I ask you to take the stenographer's glass here and see if you can make it out?
A. That is 12:30 p. m.
184 Q. That is 12:30 p. m.?
A. Yes, sir.
Q. That is when he was relieved, you have the magnifying glass?
A. That is the way it looks to me; I would take it for 12:30.
Q. When he was relieved?
A. Yes, sir.
Q. Now, the balance of it down there, what is the next line?
A. Mileage 142 miles.
Q. And overtime?
A. Yes, sir.
Q. That seems to be blurred; take the magnifying glass and see if you can find out what that is?
A. I can't do it.
Q. What is the next line?
A. Tom McDonald.
Q. What is the next line?
A. L. H. Padgett.
Q. In whose handwriting is that?

A. That looks very much like Mr. Padgett's handwriting.

Q. You have testified before that you were perfectly familiar with Mr. Padgett's handwriting?

A. Yes, sir.

Q. What have you got to say about Mr. Padgett's engine being 67 in this book, and in that book, which has not been introduced by him is engine 35 and engine 67 in this book; can you explain it?

Mr. LYLES: I do not think the witness is called upon to explain it; he did not prepare this paper and he is not responsible for it; he is not the custodian of either of those records, if there are any changes, the only record that appears changed was the one my friend produced and he calls on this witness to explain it; all he has done he says he recognizes Mr. Padgett's handwriting.

Mr. EVANS: If this was not an intelligent witness and a brother engineer and a man who is familiar, as he has testified, with Mr. Padgett's handwriting, I would not have asked him the question I have asked of him, but I think, under the circumstances, I have a perfect right now, after using that magnifying glass, that our first position shows that this man was not relieved until 12:30 and his overtime and we cannot tell about that by the magnifying
185 glass, but they have another witness who has testified a little different; now, here are two books, both supposed to have been made in Mr. Padgett's handwriting; he says that record was made by Padgett; he says Padgett's name is correct, but that he would not be certain as to the figures in the register book as to whether those figures were made by Padgett or not.

Mr. LYLES: He is not an expert on handwriting and he is not the custodian of the records.

The COURT: I do not know that he had qualified as an expert on writing.

Mr. EVANS: Can you explain that or not; if -- can or can't say yes or no.

A. I cannot explain why he registered 35 here and 67 here.

Q. You are willing to testify that all of these is in his handwriting and his own time book?

A. No, sir.

Q. You are not?

A. No, sir.

Q. Look at that writing and see if it is not similar the whole way through?

A. No, sir.

Q. I will ask your Honor to look at it.

Q. You would not swear to that, but you swore to Padgett's name, but you would not swear to those figures?

A. No, sir.

Q. All right; now, we will come to this: if you came in on your run and expected to be relieved and then found out that you were not going to be relieved and you had made up your report, would

you not rub out your report what you had put down until you found out what you had to put down?

Mr. LYLES: That is speculation.

Mr. EVAN: Under ordinary circumstances that is so.

Mr. LYLES: It is up to them to explain that.

Mr. EVANS:

Q. This big book shows he came in on 35?

A. Yes, sir.

186 Q. And the little book shows he came in — 67?

A. According to that time ticket it was engine 67.

Q. That is his name?

A. That is L. H. Padgett.

Q. Here is his name here?

A. Yes, sir.

Q. He can't speak any more?

A. No, sir.

Q. This record here was made by L. H. Padgett, was it not?

A. This record was made by himself, by the man.

Q. Who do you mean by the man?

A. I mean by the engineer.

Q. I am talking about L. H. Padgett; his name is there in his own handwriting?

A. Yes, sir.

Q. You will not swear that these figures were made by him?

A. No, sir.

Q. He is dead, and can't speak for that record, can he?

A. No, sir.

Q. When an engineer comes in, is it not customary when he gets off his engine that he inspects it?

A. Yes, sir.

Q. And gives it an ordinary inspection and sees if there is anything to be done, and, if so, makes out his report and hangs it on the file in the roundhouse?

A. Yes, sir.

Q. Have you ever known an engineer that had a regular run to go on that went to his run from other source, or from some other source, or some of the employees, and go to his engine, or be at his place, with being called by the call boy?

A. I believe I have.

Q. Certainly you have. So, the call boy is not the only source through which an engineer, knowing that his regular train is to go out at the regular time, is not the only source through which he gets the information and through which he goes on duty?

A. No, sir.

Q. No, sir; it is not. I believe you have testified that it was not compulsory for an engineer to stay anywhere, speaking with reference to the Cayce yard and roundhouse; you said he could go to Columbia or stay at Cayce?

A. Yes, sir.

187 Q. That is correct?

A. Yes, sir.

Q. If he knew he had to go out on a certain run early the next morning, if he should stay over in Columbia when the call boy was at Cayce, he would be very careful to get up in time, or have some one call him, so that he would be at Cayce in plenty of time?

A. We have call boys provided for the purpose.

Q. Suppose he did not leave his call with the call boy, or the call boy did not know where he was, he would be very careful to see for himself and his position and run that he had, that he was there on time, a careful engineer would?

A. He would hardly want to be over there without notifying the call boy where to find him.

Q. And if he had done it he would have been very careful on account of his position and on account of the run he held to see that he got there in plenty of time?

A. He was putting all of those responsibilities on himself.

Q. And the law of self-preservation being first in us all, would he not be careful to see that he got there in plenty of time?

Mr. LYLES: We object.

Mr. EVANS: My friend has been examining his witnesses as to what Mr. Padgett might have done, and what Mr. Padgett did do, when some of them were not in one hundred miles of him when he was killed, and he examined Mr. Alex Radford.

The COURT: Go on.

Mr. EVANS:

Q. Now, one more question and that is this: You said an engineer never went to his engine, or got ready for his call through the call boy, and in connection with that I want to ask you this: That if an engineer had his engine in the roundhouse and it had been placed there for repairs, and he came to his car to go on his regular run, and he knew, and wanted to find out where his engine
188 was during the night, for instance, if he had a hot box, or a box to pack, if he knew that had to be done, and when he arrived at the roundhouse, where the engine was, and he knew those repairs had to be made, and that engine, at the time he arrived, had not been taken out of the roundhouse, would he not naturally go to his engine and see if the proper repairs had been made before the hostlers took it out, so the machinists would not make a fuss over it, if it had to go back?

A. I do not know.

Q. You do not know?

A. No, sir.

Q. You do not know—I am very much surprised, after the service you tell me you have had with them; Mr. Lyles had you telling what Mr. Padgett would have done in your examination this morning; now, I want to ask you this: Cayce is a roundhouse and junctional point where you take your engines to?

A. That is a freight terminal.

Q. A freight terminal?

A. Yes, sir.

Q. I want to ask you this: If you would consider yourself a tres-

passer in going in that roundhouse where your engine was liable to be carried for repairs, or carried for other purposes, would you be a trespasser on the railroad on their property in going there?

A. I would after I made out my work report and signed up the book, I would consider myself a trespasser.

Q. You would consider yourself a trespasser?

A. Yes, sir.

Q. In the time that you have been an engineer have you trespassed and gone in there?

A. I suppose I have.

Q. Gone in there?

A. At my own risk.

Q. At what you considered your own risk?

A. Yes, sir.

Q. And yet you are telling what you believe to be the truth so help you God?

A. Yes, sir.

Q. And God have mercy on you; that is all I have got to say.

The COURT: God Almighty will take care of that.

189 Mr. EVANS:

Q. And you heard Mr. Alex Radford, an engineer higher than you, say that he would not consider himself a trespasser?

A. Men differ in opinions.

Q. And so the United States Supreme Court has decided.

Mr. LYLES: We object.

The COURT: Yes, sir; no use to argue law to a witness.

Mr. EVANS:

Q. How old are you?

A. 39 years old.

Q. Where were you born and raised?

A. Stoganville, Ohio.

Q. How long have you been in this country?

A. About ten years.

Q. I did not think you were native born; how long had you been running in the Cayce roundhouse when Mr. Padgett was killed?

A. That was my first trip.

Q. Your first trip?

A. Yes, sir.

Q. You had never been in there?

A. I had set my train in the yard, but I had never been in the roundhouse before.

Q. Had you ever been in it?

A. No, sir; I never had; I never had been in the roundhouse up until the night he was killed.

Q. Have you ever been in there since?

A. Yes, sir.

Q. How often?

A. I could not answer that exactly.

Q. About how many times?

A. We are in there on our runs, you know, maybe every day or every other day, or maybe once a week or twice a month.

Q. In the roundhouse?

A. Yes, sir.

Q. You yourself?

A. Yes, sir.

Q. And yet every time you go in there you consider yourself a trespasser?

A. I have to go in there to register.

Q. That is where the register is placed?

A. Yes, sir.

Q. At the time Mr. Padgett was killed was the drop pit covered?

A. I do not know.

Q. You do not know?

A. No, sir.

190 Q. Were there any lights in the roundhouse?

A. I do not know.

Mr. LYLES:

Q. Will you read rules 28 and 35 in this book?

A. Rule 28 says: "Preference in assignment to runs in their respective districts shall be given to the engineer who has been longest in passenger, freight and yard service, respectively, provided he is competent and reliable."

Q. Now, rule 35?

A. Rule 35: "Engineers' seniority in road service will date from the time they are employed therein, and will remain as established by agreement of December 1st, 1901. The date on which seniority is effective is that day and time that both mechanical and transportation examinations are approved, and man in ready for service."

Q. Who had been the longest in service, Mr. Padgett or yourself?

A. Mr. Padgett.

Q. Does that account for the fact that he was a passenger engineer and you were in freight service?

A. Yes, sir.

Q. There has been something said about the fact, on this stub of Mr. Padgett's time book, it is marked one hour overtime claimed along in the first of January, 1913, do you know for what that one hour overtime was for?

A. It was claimed that the engineers would have to take their engines back to Cayce.

Q. Was that allowed?

A. The general manager overruled it.

Q. It was not allowed?

A. No, sir.

Mr. TIMMERMAN: We object to that; he does not know what the general manager did.

The COURT: It is already in there now.

Mr. TIMMERMAN: I was just fixing to take a drink of water.

The COURT: Where were the other counsel, there is Mr. Sharpe, Mr. Evans, Mr. Fanning and Mr. Sturkie.

191 Mr. TIMMERMAN: I submit we have a right to make a motion of that character and move to strike it out.

The COURT: Strike it out.

Mr. LYLES:

Q. Do you know as a fact whether that overtime was allowed?
A. It was not allowed; I know that.

Mr. TIMMERMAN: How does he know about Mr. Padgett?

Mr. LYLES: They have examined Mr. Radford and questioned him about that overtime.

The COURT: Yes, sir.

Mr. LYLES: And Mr. Radford said the same thing and I am making clear as to what overtime was claimed, it was on trains 59 and 62, I only asked him about.

Mr. TIMMERMAN: They had their superintendent of the railroad and he did not dare testify to any such a thing, and they had one of their oldest engineers on the road and now they are putting up this witness; now, the question is this, he wants to know whether the superintendent allowed the claim if they paid for the overtime to Mr. Padgett, unless he knows what Mr. Padgett's check was and what he got pay for, he cannot say; it is like the rule that he should blow the whistle.

Mr. LYLES: I will withdraw the question; it is of no importance, anyway.

The COURT: All right; it is withdrawn.

D. F. BEVILLE (white) sworn:

Direct examination by Mr. LYLES:

Q. You are an engineer in the employment of the Seaboard?
A. Yes, sir.
Q. Were you so employed January, 1913?
A. Yes, sir.
Q. Were you at Cayce on the 11th and 12th of Jan., 1913?
A. Yes, sir.
Q. What time did you come in?
A. I went in on an extra about 1:00 p. m. on the 11th.

192 Q. What train did you call it?
A. Extra 67, running extra, engine 67, extra 697.
Q. Extra 697?
A. Yes, sir.
Q. When did you go out of Cayce?
A. I was called to leave at 5:15 a. m. on the 12th, but I did not get out until about 8:00 o'clock.
Q. What did you take out?
A. Extra 67.
Q. And extra 67?
A. Yes, sir.
Q. You came in on 698?

A. Yes, sir.
Q. And went out on extra 67?
A. Yes, sir.
Q. Was that an extra freight train?
A. Yes, sir.
Q. Do you know of your own knowledge who was running engine 67 the first part of the week?
A. Yes, sir.
Q. Who was running?
A. Mr. Padgett and Wolfe. It doubled the run every day.
Q. Mr. Padgett and Wolfe?
A. Yes, sir.
Q. Do you know what engine Mr. Padgett came in on when he came in the night of the 11th?
A. He had engine 35.

Mr. TIMMERMAN: In that connection we submit that he did not go until that night.
The COURT: He is testifying of his own knowledge.
Mr. TIMMERMAN: I did not understand the witness.

Mr. LYLES:

Q. Tell us what book that is (presenting same)?
A. That is the engineers' register book.
Q. At what place was that book kept?
A. It was kept at Cayce; located in the machine shop.
Q. Did you register in this book when you came in?
A. Yes, sir, extra 697 at 1:15 p. m. on the 11th.
Q. Where was this book?
A. It was in the machine shop at Cayce.
Q. Lying open there that way?
A. Yes, sir.
193 Q. Who were required to fill in these figures?
A. The engineers.
Q. Do you know Mr. Padgett's writing?
A. Yes, sir.
Q. Will you please tell us if that is Mr. Padgett's writing?
A. That is his handwriting.
Q. Those figures are in his writing?
A. Yes, sir.
Q. And Mr. Padgett had been handling engine 67 for several trips before this one, then he came in on 35?
A. Yes, sir; about a week, I judge.
Q. When you got into Cayce and your engine was cut off from the train you were coupled to, what was your duty?
A. To go to the hostler track or shop track, and I generally backed down, and just cleared the yardmaster's office: we just put it on the hostler's track or shop track, just to clear the yardmaster's office.
Q. And that would be somewhere in here?
A. Right there.
Q. What further did your duties require you to do?

A. To give my engine a reasonable inspection.
Q. Where was that done?
A. Where I left it on that shop track.
Q. And what further was required of you?
A. To walk down there and register off and make out my work report at the machine shop.
Q. What further was required of you?
A. Not anything, but to go to bed.
Q. Where would you go to bed?
A. Over at the Hotel Darden, run by J. M. Darden.
Q. Did your duties permit you to go to Columbia if you wanted to?
A. Yes, sir; we could go to Columbia if we wanted to.
Q. When would you be on duty again?
A. Thirty minutes of the time I was to leave there?
194 Q. In between that time, after you registered off, when you went in to register off—I understand you to say you filed your work report?
A. Yes, sir.
Q. That showed what repairs were to be made on the engine?
A. Yes, sir.
Q. Supposing there was work to be done on the engine, whether the boxes had to be packed, or anything, did you have anything to do with it, or did the engineers have anything to do with that?
A. No, sir.
Q. When was the next time the engineer was required to take his engine in hand, and where did he take it in hand?
A. Right there where it was delivered to him; it was put out on the shop track.
Q. In connection with the yardmaster's office, where was that?
A. Just south of it.
Q. Is that in the roundhouse?
A. No, sir.
Q. Is there anything that required an engineer to go into the roundhouse for any purpose?
A. No, sir; not at the present time, not at the time this trouble arose he did not have to go into the roundhouse.
Q. What do you have to go in there now for?
A. They have the register book in the roundhouse now; that is the only duty we have in there.
Q. What place in the roundhouse is the register book located now?
A. It is located in the corner.
Q. Could you show that to us?
A. It is right along in here; in that corner.
Q. To get to the point where the register book is now, how do you come from the place you leave your engine?
A. At the machine shop there are two doors, a large one and a small one, and in the winter time we use the small door and turn to the right a few steps.
Q. How do you get out?
A. At the same way you went in.
Q. With the register book not in the roundhouse, was there any

necessity for an engineer to go to register to come around
195 through the roundhouse?

A. Not unless he wanted to take a walk, and men usually take a short cut.

Q. Does the place where the book is now situated bring you in danger of this drop pit, or those pits under the tracks?

A. No, sir.

Q. In January, 1913, what have you to say as to any custom of the engineers at Cayce of going into the roundhouse; state whether or not there was any such custom?

A. No custom at all; it was not customary for engineers to hang around the roundhouse; he has no business there, and, in fact, I use my time at home; in fact, every engineer here does.

Q. Was there any duty to the company?

A. He is relieved of all duty when he signs in that book, unless he takes it on himself to go here; the company does not require him; after he registers off his pay stops.

Q. Did you see Mr. Padgett that night?

A. No, sir; I was asleep when he came into Cayce.

Cross-examination by Mr. EVANS:

Q. Your name is Dan Beville?

A. Yes, sir.

Q. Your residence is in Savannah?

A. Yes, sir.

Q. That is where you live?

A. Yes, sir; born and raised there.

Q. What make of automobile do you drive?

A. Ford.

Q. A pretty good machine?

A. It suits me all right.

Q. I believe you said an engineer when he was not on duty usually stayed at home?

A. If he wants to.

Q. You spend a good deal of your time automobiling?

A. I have my family with me.

Q. I did not ask you about your family?

A. Not always; I have not been in that car in three weeks.

Q. You need not get mad?

A. I am not mad.

Q. I believe you said an engineer, when off duty, he is a home man, and spends his time at home?

A. Yes, sir.

196 Q. But you have your automobile and you automobile a good deal?

A. I do not have time to automobile much.

Q. An automobile is an expensive proposition if you do not use it?

A. It is mine; paid for it; I can use it whenever I get ready.

Q. Of course, I know you paid for it.

The COURT: What has an automobile got to do with this case?

Mr. EVANS: It has some bearing on the case with reference to the

witness on the stand; I know more about this case than your Honor does.

The COURT: I know you know more about it than I do.

Mr. EVANS:

Q. You say a man generally takes short cuts?
A. Yes, sir.
Q. Did not Mr. Lyles ask you that if you wanted to you could have stayed at Columbia when you were off duty?
A. Yes, sir.
Q. A man that spent the night in Columbia and had to go out on his run early—have you ever spent the night in Columbia?
A. Not since we stopped at Cayce.
Q. Never have?
A. I am on a passenger run and stay there; the passenger train stops at Columbia.
Q. You have stopped at Columbia when you ran there?
A. On a freight train.
Q. Since you have been running?
A. Since I have been running.
Q. And at that time you never took that short cut?
A. No, sir; when I came in on a freight train I stayed at Cayce; I might have gone to Columbia and registered off at Cayce on a freight train, possibly.
Q. Are you a passenger or freight man?
A. Freight man.
Q. How long have you been in the service?
A. I have been running an engine for five years.
197 Q. How old are you?
A. 30 years old the 9th of this month.
Q. Let us look at these two books here; this is the book where the engineers write when they go in and out?
A. Yes, sir.
Q. I believe you testified that you knew Mr. Padgett's writing?
A. Yes, sir.
Q. And I believe you further testified that all of those figures, the name and everything, where his name is written is his handwriting?
A. Yes, sir.
Q. You are acquainted with his handwriting?
A. Yes, sir; I fired for him two years.
Q. And found him to be a good man?
A. He was all right; a good man.
Q. You do not think he would attempt to put down anything wrong?
A. I cannot say.
Q. You found him to be straightforward and all right?
A. Yes, sir; all right.
Q. And a gentleman as far as you knew?
A. Yes, sir; but I do not know what a man will do.
Q. Did you ever know a dirty act of him?

A. No, sir; I never knew any; I can only account for myself.

Q. I am going to hand you a little book in which he kept his time, in which he had the stub and delivered the other part to the railroad company; now read that stub and see if it is not in his writing; you can go through the whole book if you want to and review it all, and compare this and this and see if they are similar and see if that is his writing?

A. That last ticket does not look like his writing.

Q. That last ticket does not look like his writing?

A. No, sir.

Q. I will ask you to take both books and compare them with the jury and see if they seem to be the same handwriting or not; I will hold this; here is the register book; what page is the number of this; now get to the numbers and go down the whole way and
198 compare that writing with this book; now turn back through some of these other stubs and compare this stub with the other stubs?

A. It does not look like his writing to me.

Q. You are familiar with his writing?

A. Yes, sir; I know Mr. Padgett's writing.

Q. This would be his book, would it not?

A. I presume it is; it has his name in it.

Q. All engineers have one?

A. I have one just like it; I have it at home.

Q. No one would have any business writing in this book but L. H. Padgett?

A. It does not look so to me.

Q. That was his private property?

A. Yes, sir.

Q. Showed the money he made every day?

A. It certainly does.

Q. And even shows the money you make?

A. Yes, sir.

Q. Do you allow any one to use it or handle it?

A. No, sir; but sometimes my wife gets it and looks at it to see how my time is coming out.

Q. She is authorized to do that?

A. I do not know what she does when I am asleep.

Q. I presume your wife is a good woman, like every wife should be?

A. I hope so.

Q. And she would not do anything to your book improperly?

A. No, sir; I do not mean in that respect.

Q. If you had occasion to go in and out of the roundhouse at Cayce, and it being a run, or your terminal, where your engine was, and you stopped and got off your engine, and repairs had to be made on it, and you put that on a piece of paper and went into the roundhouse and hung it on a nail for the machinists to get it and do the repairing, would you consider yourself a trespasser in going in and out of that roundhouse?

A. After I registered off?

Q. Either one, registered on or registered off; whether registered on duty or off duty, when your engine was in there that you
199 had to take out within the next few hours?

A. If I had not registered on duty, I think I am a trespasser.

Q. When you go and register are you a trespasser.

A. I am on duty then.

Q. But you are called one hour and 15 minutes before?

A. At Cayce, I am.

Q. Before you go?

A. Yes, sir.

Q. Before?

A. Yes, sir; one hour and 15 minutes beforehand, at Cayce only.

Q. That is the only place?

A. Savannah, two hours.

Q. You are a freight engineer?

A. Yes, sir.

Q. And freight engineers are called at the same time?

A. No, sir; at Savannah or Cayce, or at Savannah we have to walk to the shop, it is a little over a mile.

Q. Here at Cayce are the passenger and freight engineers called at the same time?

A. Passenger men are called in town; they get their engines in Columbia.

Q. Did you ever go to your engine without being called by the call boy?

A. No, sir.

Q. You never have?

A. I never have; I am always called.

Q. You hweard one of your engineers say he did not do it?

A. I cannot help what he does.

Q. You are a late sleeper?

A. I have not been jacked up for being late.

Q. Ever been jacked up for anything?

A. Yes, sir.

Q. For what?

A. Different things; a lot of things.

Q. Name them?

A. I had break downs and delays that I had to account for.

Q. Never had a wreck?

A. No, sir.

Q. Never was in one?

A. No, sir; I don't believe I have been.

Q. Ever been laid off duty?

A. I never have served a day on the Seaboard.

200 Q. Or any other road?

A. I never have worked for any other road; I fired three years and a half and have been running an engine five years.

Q. I want to ask you another thing; when an engineer comes into Cayce, like this afternoon, and he finds there are certain repairs to be made on his engine, and that engine is carried in the roundhouse for repairs, after you put your sign up?

A. After I go out and register off and turn it over to the hostler.
Q. And it is carried in there for that purpose?
A. Yes, sir.
Q. If you should happen to get to that roundhouse the next morning before the hostlers should take it out, and you had put it in there for repairs the night before; state whether or not, if it had not been taken out, would you go and see if the proper repairs had been made?
A. No, sir.
Q. You would wait until it got to the track?
A. Yes, sir.
Q. And if it had to be repaired over you would send it back?
A. I would wait.
Q. You would send it back if the repairs had not been made?
A. I inspect it before I go out.
Q. And if it had not been done you would send it back?
A. Yes, sir.
Q. And you were in 30 minutes of the time to go out?
A. Yes, sir.
Q. And you would be delaying your train?
A. Yes, sir.
Q. And not only that, but would not the mechanical department get on you and the whole business for not seeing that it was done before it went out of the roundhouse?
A. No, sir.
Q. Have you got a master mechanic?
A. Yes, sir; C. S. Patton.
Q. Where is Captain Mudd?
A. He was at that time general foreman.
201 Q. He was the master mechanic?
A. No, sir; he was the general foreman.
Q. He was in charge of the machine shop?
A. He had charge of the mechanical department.
Q. Have you got him here today?
A. I do not see him.
Q. You do not see him?
A. I have nothing to do with that.
Q. Was he here yesterday?
A. Yes, sir.
Q. And day before yesterday?
A. Yes, sir; he was, and they can get him here tomorrow.
Q. He is a general inspector?
A. I think he is general inspector; I do not know whether you would call it any higher; I do not think I would call it any higher.
Q. You want to reflect on him?
A. No, sir; but I would rather have a job at one place than to be traveling all other the road.
Q. You want to reflect on his position?
A. No, sir; I am not that kind.
Q. I just wanted to know; do you go in the roundhouse now when you go there to register?

A. Yes, sir; at Cayce; you know we have three roundhouses on our line of road.

Q. We have not been speaking of but one roundhouse, and that is where that man was killed?

A. Yes, sir.

Q. And I care nothing for the rest?

A. The register book at Cayce is in the roundhouse.

M. P. ALDRIDGE (white) sworn:

Direct examination by Mr. LYLES:

Q. Are you one of the hostlers at Cayce that we have been talking about in this case?

A. Yes, sir.

Q. Were you the hostler there the night that Mr. Padgett was killed?

A. Yes, sir.

Q. Do you recall where you first saw engine 35 that night?

A. Yes, sir.

Q. Where was it?

A. At the clinker pit.

202 Q. At the clinker pit?

A. Yes, sir.

Q. Do you know who had left the engine on the clinker pit?

A. No, sir.

Q. Do you recall what train engine 35 came in on?

A. 62.

Q. Who brought it in?

A. Mr. Padgett.

Q. Do you recall what time it was you took charge of engine 35 at the clinker pit?

A. About 10:45, Columbia time.

Q. What did you do with that engine?

A. I took the engine off the clinker pit and put her on the turntable and switched her on the passing track and took her right to the hostler's track.

Q. Is that inside the roundhouse?

A. Outside.

Q. What did you do?

A. Carried it to the coal chute and got coal and got water and put it on the main line.

Q. Put it on the main line?

A. Yes, sir.

Q. What did you do with it then, if anything more?

A. I took it from the main line and set it by the side of the roundhouse on the passing track.

Q. Will you please show me where it was you set that engine?

A. I set it right here.

Q. Opposite the boiler room?

A. Yes, sir; opposite the boiler room.

Q. Opposite the boiler room?

A. Yes, sir.
Q. What did you then do with it?
A. I let it stay there until the next morning.
Q. About what time was it you put the engine on the passing track just opposite the boiler room?
A. About 12:00 o'clock, Columbia time.
Q. What did you do with it the next morning?
A. Took it out and watered it and put in on the coal chute track.
Q. For what purpose?
A. For the men to take it out to the passenger station to go out on a train.
Q. What train?
A. No. 59.
203 Q. Do you know what Mr. Padgett's run was at the time he was killed?
A. 59 and 62.
Q. When you left an engine on the passing track by the side of the boiler room about 12:00 o'clock that night, when you went back the next morning, was it in the same place, in the place it ought to be to go out on 59, did you find the engine in the same place?
A. Absolutely in the same place.
Q. Were there any indications that the engine had been moved from that place?
A. Not any whatever.
Q. Was that engine ever in the roundhouse that night?
A. Not that night at all.
Q. Do you know whether engine 35 was the engine that Mr. Padgett brought in on 62?
A. That was the same engine.
Q. Was that the same engine that went on 59 the next morning?
A. Yes, sir.
Q. Before that day do you know what engine Mr. Padgett had been running?
A. He had been running 67.
Q. What sort of an engine was 67, was used exclusively in the freight service?
A. Sometimes in passenger service and sometimes in freight; in case of emergency it was used as a passenger engine.
Q. Do you remember how long Mr. Padgett had been running 35?
A. I do not remember how long he had been running it.
Q. Do you happen to know of your own knowledge who brought 67 in on the 11th?
A. No, sir; I could not say.
Q. Was the fireman, Tom McDonald, on engine 35?
A. Yes, sir.
Q. Was he the fireman with Mr. Padgett that night?
A. Yes, sir.
Q. At that time?
A. Yes, sir.

Q. Did he come in with Mr. Padgett on 35 from Savannah?
A. Yes, sir.

204 Cross-examination by Mr. EVANS:

Q. How old are you?
A. 22.
Q. How long have you been a hostler over there?
A. About one year, off and on.
Q. Off and on?
A. Yes, sir.
Q. How long off and how long on?
A. I have been off five months; I hostled from the first Sunday they moved there until the 27th of April.
Q. Did you know Mr. Ernest Horsford, the hostler, over there?
A. Yes, sir.
Q. Both were working there that night?
A. Yes, sir.
Q. Who was your helper?
A. Sidney.
Q. What else?
A. That is all I know.
Q. How long had you been working with him?
A. About two months.
Q. Was he a negro?
A. Yes, sir; about two months.
Q. And you do not know his name except Sidney?
A. That is all.
Q. Is that not rather indefinite?
A. I knew his given name; I did not keep his time.
Q. He was with you, your assistant every day?
A. Whenever I wanted him, I said, come here.
Q. Come here?
A. Come here to me.
Q. What did you call him, Bill, Jack or John?
A. The first name I thought of.
Q. And sometimes that was with a cuss word, was it not?

Mr. EFIRD: That has nothing to do with it.

WITNESS: I do not use profane language.

The COURT: I cannot see what that has to do with it.

Mr. EVANS:

Q. You say you know Bill Ricks?
A. Yes, sir.
Q. You were here Monday?
A. Yes, sir.
Q. You were here Monday night?
A. No, sir; I went to Columbia.
205 Q. You were here Monday afternoon?
A. I left at 5:42.

Q. When did you come back?
A. Tuesday morning.
Q. Do you see Bill Ricks over here?
A. Yes, sir.
Q. Talk with him?
A. Just spoke, that is all.
Q. Why did you take Bill Ricks off and try to get him to swear that engine 35 was never put in the house that night?
A. I did not do it.
Q. You did not?
A. No, sir.
Q. On Monday afternoon did you not take that negro off and try to get him to swear that engine 35 never had been put in the roundhouse?
A. No, sir.
Q. You did not?
A. No, sir.
Q. You are positive?
A. I said no, sir.
Q. You have not done it since you have been over here?
A. No, sir; I had no cause to do it; it did not go in the roundhouse at all.
Q. Why did you make the statement that Ernest Horsford was coming to testify in behalf of the plaintiff and you for the railroad, and that you would run on the road and be an engineer and he would still be a hostler?
A. I never made that statement.
Q. Are you positive?
A. No, sir; I never made that statement, but one statement I gave to Mr. Mudd.
Q. You have not talked that to anyone?
A. No, sir.
Q. When did the Seaboard put you back to work?
A. The first of February; I came back the first of February.
Q. The first of this February?
A. Yes, sir.
Q. And you have been off five months?
A. Yes, sir.
Q. And you have been over there hostling for them on and off a year?
A. I have been working there about three years.
Q. Where?
A. Columbia and Cayce.
Q. Who has been the longer in service, you or Ernest Horsford?
A. Ernest Horsford has been in the service longer.
206 Q. He has been in the service longer?
A. Yes, sir.
Q. When Ernest Horsford, the hostler that night, and his assistant testified that they took engine 35 out of the roundhouse that night and watered it and coaled it, they are mistaken?
A. They sure are.

Q. They sure are?
A. Yes, sir.
Q. Have you got your assistant here?
A. No, sir.
Q. Why did you not have him here?
A. That does not come within my jurisdiction.
Q. Have you been staying here?
A. No, sir; that is some one else's business.
Q. You heard Ernest Horsford, who was the other white hostler, and his assistant, Bill Ricks, and Mr. Horsford are not working for the Seaboard?
A. Yes, sir.
Q. And Bill Ricks is working for the Southern Railway?
A. Yes, sir.
Q. And you heard both of them and Henry Wallace say——
A. I was not in here.
Q. You were over here?
A. Yes, sir.
Q. If they all testified to the fact that engine 35 was in the roundhouse in stall No. 3, and that Mr. Horsford and his helper coaled it and watered it, they are wrong?
A. They are wrong.
Q. They are wrong?
A. Yes, sir.

H. O. LINDLER (white) sworn:

Direct examination by Mr. LYLES:

Q. Do you work for the Seaboard?
A. Yes, sir.
Q. Were you so working on the 11th and 12th of January, 1913?
A. Yes, sir.
Q. Where is your home?
A. About twelve miles above here.
Q. In this county?
A. Yes, sir.
Q. Does your father live there?
A. Yes, sir.
Q. Your father lives there?
A. Yes, sir.
207 Q. On the morning of January 12, what was your position?
A. Clerk for the general foreman.
Q. What were your duties with reference to clerical work, or with reference to the mechanical department?
A. I had nothing to do with the mechanical department; I attended to the clerical work and time keeping.
Q. Did you have charge of the register book?
A. Yes, sir.
Q. Tell us first when you went on duty on the morning of the 12th?

A. Between 7:10 and 7:15.
Q. Did you see that register book then?
A. No, sir; I saw it about 7:30.
Q. Do you know whether that is Mr. Padgett's writing or not?
A. Yes, sir; that is Mr. Padgett's writing.
Q. That whole line?
A. Yes, sir.
Q. That includes the figures?
A. Yes, sir.
Q. Is that, as it stands now, in the same condition as when you first saw it that morning at 7:30?
A. Just as it was then.
Q. What are those two marks?
A. I put them there about eight o'clock that morning.
Q. Otherwise that line is in the same condition now?
A. Yes, sir.
Q. Have there been any erasures or additions?
A. Not since then; no, sir.
Q. Were you keeping a diary at that time?
A. Yes, sir.
Q. Will you look and tell me if you went into the roundhouse after Mr. Padgett was killed?
A. Yes, sir.
Q. Do you happen to recall what engines were in the roundhouse?
A. I recall the two that were on tracks two and three.
Q. What time was that?
A. That was about 7:15 that morning.
Q. What were the numbers of them?
A. 773 was in track No. 2, and 646 was in track No. 3.
Q. Have you those numbers in your diary?
A. I think so.

208 Mr. EVANS: I would like to examine that book before you offer it.

Mr. LYLES: That was 7:15 that morning?
A. Yes, sir.
Q. Is that all you know about the case?
A. Yes, sir.

Cross-examination by Mr. EVANS:

Q. Let me see it?
A. I do not care to present it; it is just my daily personal affairs.
Q. Is this a railroad record?
A. No, sir; it is my personal record.
Q. Has nothing to do with the railroad?
A. The railroad has nothing to do with this book.

Mr. LYLES: That book has not been introduced.

Mr. EVANS: That proposition just now came up.
The COURT: That book has not been introduced in testimony.
WITNESS: It was just to refresh my memory.

The COURT: That is his own private data, which he refreshed his memory, made contemporaneously.

Mr. EVANS:

Q. When was Mr. Padgett killed?
A. On the night of the 11th and morning of the 12th.
Q. It could not be both the 11th and 12th, could it?
A. It was on the night of the 11th and morning of the 12th.
Q. I think your Honor should read the note of Jan. 12th.

Mr. LYLES: He has not done anything but refresh his memory; I have not read it myself.

Mr. TIMMERMAN: He testified about this; my friend asked him if he kept a diary, and he asked if his diary contained certain things, and was not used to refresh his memory.

The COURT: That book has not been introduced in evidence.

Mr. TIMMERMAN: That has nothing to do with this case.

209 The COURT: That book has not been introduced in evidence.

Mr. EVANS: We will let that go.

Q. You got to work a little late on the morning of the 12th?
A. Yes, sir; 10 or 15 minutes.
Q. You got there about 7:15?
A. Yes, sir.
Q. You had been up late the night before?
A. No, sir; not unusually.
Q. Not unusually?
A. I did not say whether it was unusual.
Q. I asked you whether you had been up a little late?
A. I do not recollect just now.
Q. I will ask you to take your diary and refresh your memory?
A. No, sir; that does not say so.
Q. It does not?
A. That was in the morning I was a little late.
Q. Was a little late, got here at 7:15?
A. Yes, sir.
Q. Who first informed you that morning that Mr. Padgett was dead?
A. The storekeeper.
Q. Who is he?
A. Mr. Lindler; they call him Dad.
Q. What did he tell you?
A. He told me that Mr. Padgett had fallen in the pit and killed himself.
Q. In the drop pit?
A. Yes, sir.
Q. What did you then do?
A. I went in the roundhouse and looked in the pit.
Q. What did you see?
A. I saw Mr. Padgett in the pit.
Q. That was about what time?
A. 7:15.

Q. You got up at 7:15?
A. No, sir.
Q. You got there at 7:15?
A. Yes, sir.
Q. What time was Mr. Padgett to leave there, or was his engine to leave Cayce?
A. From 6:00 to 6:30.
Q. What time should the engine have been out of the roundhouse, if it was in the roundhouse, to take the run that he was to take out?
A. Anywhere from 5:30.
210 Q. If Mr. Padgett's engine had come out of the roundhouse at 5:30, with the number of engines you had at Cayce at that time, was it not possible that other engines came into that roundhouse between 5:30 and 7:15?
A. Yes, sir; it is possible.
Q. Because that is what those tracks are for?
A. Yes, sir.
Q. For the engines to go in and out for repairs?
A. Yes, sir.
Q. And the time from 5:30 to 7:15 is how long?
A. One and three-quarter hours.
Q. And Mr. Padgett's engine should have come out at 5:30 to take that train?
A. Some time along there.
Q. And you only had ten repair tracks in the house?
A. Yes, sir.
Q. And it is perfectly possible that other engines could have been run in on those tracks?
A. They could have been run in on the other tracks.
Q. And you have ten tracks?
A. Yes, sir; they were not occupied.

Mr. LYLES: We offer in evidence these divorce proceedings.
Mr. EVANS: This paper has already been read into the record.
The COURT: It is properly authenticated.
Mr. LYLES: Mark it in evidence (Exhibit 12).

Case for the Defense. No Reply.

Appendix.

Showing exhibits in the order in which they were introduced in testimony.

EXHIBIT 1.

Calendar: It is stipulated that it is not necessary to print this.

211 EXHIBIT 2.

Letters of Administration: It is stipulated that these were in proper shape, according to the South Carolina Statutes, and since no question is made concerning them, it is not necessary to print them.

EXHIBIT 3.

Mortuary table found in Section 4014, Volume I, Code 1912.

EXHIBIT 4.

Blue print introduced by Engineer Chisolm for plaintiff. It is stipulated that either side may furnish the Court with copies of this blue print, as it is too large to be printed in the case.

EXHIBITS 5 AND 6.

Photographs taken by Photographer Blanchard. It is stipulated that either side may exhibit these to the Court.

EXHIBITS 7 AND 8.

Blue prints introduced by Engineer Garrett for defendant. It is stipulated that counsel for defendant is to have the right to furnish the Court with copies of these since they are too large to be printed in the case.

212 EXHIBIT 9.

(The cover is as follows:)

"Seaboard Air Line Railway.

Schedule of
Rates, Rules and Regulations
for
Engineers.

In Effect September 15, 1911.

Superseding Schedule Dated April 11, 1910."

(The first page contains the following:)

"Seaboard Air Line Railway.

Schedule of Rates, Rules and
Regulations for Engineers.

Effective September 15, 1911, the following rates of pay and regulations will govern the employment of engineers, superseding schedule of rates, rules and regulations dated April 11, 1910, and special rulings relating thereto; and will remain in effect until thirty (30) days' notice in writing is given by either party of a desire to change same."

(The following rules were placed in evidence:)

"21. Engineers in freight service will run first in and first out of terminals, except where assigned to regular runs.

"Engineers will be called for their runs regardless of engines.

213 "Engineers run around through no fault of their own, except to protect wreck trains, will be paid for trip lost.

"22. Engineers will be called one hour and fifteen minutes before leaving time of the train they are to take out, except at the following points: Portsmouth, one hour and thirty minutes; Abbeville, for those living beyond Cothran's Branch, one hour and thirty minutes; Birmingham, Savannah, Jacksonville, freight men, two hours; Howell's freight men, Birmingham district, two hours. The caller will be provided with a book showing the time for which crew is called, in which the engineer will register his name and time called.

"23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called.

"24. Engineers will not be required to do what is known as machinist work on their engines at terminals, relay or turn-around points, except in case of emergency, and when so required, they will be paid at overtime rates for such service. Engineers will not be required to fill grease cups, lubricators or put tools or supplies on or off engines at the following points: Portsmouth, Hermitage, Raleigh, Hamlet, Monroe, Abbeville, Howells, Birmingham, Columbia, Savannah, Americus, Jacksonville, Waldo and Tampa. It being understood that tools on assigned engines will not be disturbed except when assigned engines are placed in pool service.

"27. Engineers will not be held responsible for engine after being relieved from duty.

"28. Preference in assignment to runs in their respective districts will be given to the engineer who has been longest in passenger, freight and yard service, respectively, provided he is competent and reliable."

214 (The agreement is signed as follows:)

"For Engineers:
CHAS. M. PARSON,
General Chairman.

A. J. POOLE,
Supt. Motive Power.
H. W. STANLEY,
General Supt. Trans.

Approved:
C. H. HIX,
Vice-President and General Manager."

EXHIBIT 10.

Time book of Lewis H. Padgett, deceased, produced by Mr. Evans. It is stipulated that this may be shown the Court, as it is not possible to reproduce it in the case.

EXHIBIT 11.

Official time table of Seaboard Air Line Railway, South Carolina Division, between Cayce and Savannah, and Cayce and Hamlet, effective January 5, 1913, showing the schedule time of all trains at Cayce on January 11-12, 1913, as follows:

(Only the trains involved in the case are given:)

Southward.

Leaving Time.

43	Seaboard Fast Mail	11.49 P. M.
61	Local Passenger	4.10 P. M.
81	Florida-Cuba Special	11:20 A. M.

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59	Local Passenger	6:10 A. M.
99	Seaboard Limited	3:59 A. M.

Northward.

Arriving Time.

66	Seaboard Fast Mail	4:25 A. M.
60	Local Passenger	10:50 A. M.
84	Florida-Cuba Special	5:20 P. M.
62	Local Passenger	8:50 P. M.
98	Seaboard Limited	10:50 P. M.

217 EXHIBIT 13.

Engineer's registry book in use at Cayce on night- of January 11-12th, and containing the signature of Padgett. It is stipulated that this book shall be furnished to the Court, since it is not possible to reproduce the same in the Case.

218 *Motion for Direction of Verdict.*

The defendant moves the Court for the direction of a verdict in its favor upon the following grounds:

1. Because there is an entire failure of evidence to support the material allegations of the complaint.

2. Because the plaintiff has failed to produce evidence admitting of the inference that Lewis H. Padgett was employed in interstate commerce at the time of his injury and death.

3. Because the entire evidence does not admit of the inference that Lewis H. Padgett, plaintiff's intestate, was employed in interstate commerce at the time of his injury and death.

4. Because the entire evidence does not admit of the inference that there was any negligence on the part of the defendant, its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate.

5. Because, upon the entire evidence, the only inference is that plaintiff's intestate assumed the risks of the damages and defects causing his injury and death.

The Court (after hearing arguments) said: Gentlemen, we have been taking testimony in this case for two days. Now, if there is any testimony whatever in that record, it has got to go to the jury. You know a scintilla of testimony is a very minute piece of testimony, and I will say there is a scintilla somewhere in that record, and I am going to overrule the motion and let the jury decide the case.

Judge's Charge.

Mr. Foreman and Gentlemen: You certainly have been patient in listening *at* the testimony in this case, and also the arguments, and I congratulate you now on the fact that the case should now soon come to a close.

219 The law imposes on me the duty of charging you the law applicable to this case. The facts in this case are for you. I cannot express any opinion on them whatever; so you find the facts and take the law as I shall give it to you. This is an action brought by the plaintiff as the administratrix of her deceased husband for the recovery of seventy-five thousand dollars damages for the benefit of herself and her children, as the complaint alleges. You have heard this complaint and answer read, and I have no doubt you have in your mind the issues between the parties. The complaint alleges that the Seaboard Air Line Railway Company is a corporation, and that it is engaged in interstate commerce, and that its line of road runs through South Carolina into the State of Georgia, and that Lewis H. Padgett was one of its engineers, and that plaintiff's intestate, at the time of his death, was discharging his duties as an interstate employee, and was in the employment and service of the defendant at the time of his death. The complaint alleges that Mrs. Clara V. Padgett was duly appointed administratrix of his estate. It alleges that at a certain point near the defendant's station at Cayce, on the line of railroad operated by the defendant, as aforesaid, there was and is located a roundhouse and pit in the said roundhouse, which was used and operated by the defendant for the use and operation of its engines and trains from the station of Savannah, Ga., through South Carolina, North Carolina, and Virginia.

And it alleges that this man was engaged as a locomotive engineer, fell into that pit, which the complainant alleges was uncovered and unlighted, and that the defendant was negligent in not giving him a reasonably safe place to work. The complaint alleges negligence on the part of the defendant company relative to that pit in the roundhouse, and in allowing the roundhouse to be used by its employees before it was completed, and while in an unsafe and danger-

ous condition, and in directing and permitting Lewis H. Pad-
220 gett to go to his engine, which was in the roundhouse, standing over this open, unprotected drop pit, in the night time while it was dark and no lights installed in the roundhouse or other protection to prevent him from walking or falling into this dangerous pit over which his engine was standing, and had been placed there for repairs. It alleges that the defendant was negligent in these particulars, and asks at your hands damages; that he fell in there and lost his life through their negligence.

The defendant comes in and admits that it is a corporation. It admits that it is engaged in interstate traffic, and it admits that Mr. Padgett was one of its engineers, but denies that his death was caused by any negligence on their part, and also denies that he was in their employ as an engineman at the time of his death, as alleged in the complaint. That is practically what this answer sets up. You see it just denies the charge of negligence.

They set up here what is known in law as two affirmative defenses, to wit: Contributory negligence and assumption of risks. Contributory negligence, that is, that he himself was negligent, and that his death was brought about by his own negligence; and that any defects, if any defects were there, he assumed the risks. Those are the affirmative defenses.

Before the plaintiff can recover in this action it is incumbent on her to establish every material allegation of this complaint by the preponderance of the testimony, that is, the greater weight of the testimony. Likewise, it is incumbent on this defendant to establish its two affirmative defenses, to wit: contributory negligence and assumption of risks, by the preponderance of the testimony. This action is based on negligence.

Now, what is negligence? Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a per-
221 son, under existing circumstances, would not have done, the essence of the fault being in commission or omission. That is negligence. I will charge you what the duty of the defendant corporation was fully later on. That is what this defendant is charged with. Now, what is contributory negligence? That is an affirmative defense set up by this defendant, and also the assumption of risks.

Contributory negligence is the want of ordinary care upon the part of a person injured by the negligence of another combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. That is contributory negligence. You see, that means both parties were negligent. The defendant, granting it was negligent, that the plaintiff also was negligent, and those two negligent acts combining and becoming the proximate cause of the injury, as a direct and proximate cause. The failure on the part of the party injured to exercise ordinary care under the circumstances. Under the Act under which this case is brought, contributory negligence will not defeat the right of the plaintiff to recover, but it will diminish the damages that the plaintiff is entitled to recover.

This action is brought under what is known as the Federal Employer's Liability Act. Now, I am going to read you what the book says: In order to establish a cause of action under the Act, therefore, the offending carrier at the time of the injury must have been engaged in inter tate and foreign commerce, and the injury must have been suffered by the employee while employed by such carrier in such commerce. Both of these facts must be present or the Act does not apply,—the carrier must be actually engaging in interstate commerce, and the employee must also be taking part therein. Now, ask yourselves the question, were both of these parties, at the time of the alleged death, engaged in interstate commerce; if you
222 should find that one was engaged in inter-state commerce, as the railroad, if engaged in interstate commerce, but that Mr. Padgett was not, then the plaintiff cannot recover.

Now, gentlemen, the law of this case is very fully covered by the number of requests to charge submitted to me by the plaintiff and defendant. Now, I shall take up first the plaintiff's requests to charge.

"1. The complaint and answer in this case puts before you the contention of the parties, the issues that you are to decide. If the plaintiff has made out by the preponderance of the evidence some one or more of the allegations of negligence contained in the complaint, and such negligence was the direct and proximate cause of the death of L. H. Padgett, plaintiff's intestate, then I instruct you to find a verdict for the plaintiff in such an amount as will compensate for the injury sustained." I charge you that. Not only must the defendant have been negligent, but the negligence must be the direct and proximate cause of the alleged injury. Proximate cause means direct, efficient cause, without which the injury would not have occurred.

"2. This action is brought under the Act known as the Federal Employers' Liability Act of 1908, which supersedes and does away with the State law; and the issues in this case are to be determined in the light of said Act, as it is the law governing this case. Under this Act the damages for which the defendant would be liable to the plaintiff, if any, are what is termed compensatory damages, or, as it is sometimes called, actual damages. In other words, it is the actual damage or pecuniary loss sustained by reason of the death of plaintiff's intestate." I charge you that.

"3. Now, this Federal Act. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty
223 of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. That is the law, and I have explained contributory negligence. If you find that Mr. Padgett was negligent also that will not defeat his right of recovery, but it merely diminishes the amount of damages, if you think the plaintiff is entitled to damages. It will be seen from the reading of this section that the right to recover is not defeated en-

tirely upon the negligence of an employee unless it appears that the negligence of an employee was the sole cause of the injury complained of. Even if the employee's negligence is equal to or greater than that of the common carrier, and the common carrier is also negligent, it will not bar a recovery for damages if it is established that the injury complained of resulted in whole or in part from the negligence of the common carrier. In case of injury resulting in death the jury should first find the amount of damages to which decedent's next of kin would have been entitled in the absence of any contributory negligence on his part; and they should then abate that sum by the amount which they shall find represented decedent's proportionate negligence. In case the injury is due entirely and solely to the negligence of the railroad, then the jury would not be warranted in making any abatement but should give a verdict for the full amount." I charge you that.

"4. Where an employee is injured under such circumstances that the carrier or railroad is liable under the Federal Employers' Liability Act, the measure of damages is the loss in money that the death of such employee (in case of a death) causes the beneficiaries who are entitled to recover under that Act. In this case the original complaint alleges the beneficiaries to be the wife and eight children,
but it has been stated in open court by counsel for the plain-
224 tiff that no claim for damages will be made on account of
and for the alleged beneficiary, Rosa Lee Padgett. Therefore, if you find that the plaintiff is entitled to recover at all, you will only find damages for the benefit of the widow, Clara V. Padgett, and the other seven children named in the complaint." I charge you that.

"5. On the question of damages, if you should find a verdict for the plaintiff, I charge you that under the Federal Employers' Liability Act, which covers the rights and liabilities of the plaintiff and defendant respectively in this case, as it is alleged in the complaint that plaintiff's intestate was an employee of the defendant and at the time of his death he and the defendant were engaged in interstate commerce. The provisions of this Act, expressed or implied, must determine the measure of damages, and if you find that the plaintiff is entitled to recover, because it is absolutely exclusive on this subject, and in this case the question of damages is not covered by the laws of the State of South Carolina." I charge you that.

"6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment, and as this case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier." I charge you that. That covers what I said here while ago. Under the general law he assumed all the risks, but this is not so under this Federal Act; he merely assumes the risks incident to his employment, except as to that.

"7. The action here being tried is based entirely on negligence, and the law imposes upon the plaintiff the burden of satisfying you by the preponderance or greater weight of the testimony that the

defendant was negligent in the particulars described in the
225 complaint. Should negligence be shown in particulars other than alleged in the complaint, it would be no ground for recovery, but if it is shown, as alleged in the complaint, then it would be your duty under your oath to find a verdict for the plaintiff in such an amount as would compensate for any injury proven to have been sustained by the plaintiff by reason of such negligence." I charge you that.

Now, as to the eighth, I have already covered that.

"9. A proximate cause in the law of negligence is the cause that operates to produce a particular result without the intervention of any dependent, unforeseen cause; it is the real cause, the efficient cause, without which the injury would not have occurred. So, if you find from the evidence that the defendant was negligent you must further consider whether the negligence of the defendant was the proximate cause of the injury complained of." I charge you that. The balance of that request is merely metaphysical stuff. You understand what proximate cause is.

"10. There are certain duties that the law imposes upon the master, the performance of which cannot be thrown off or delegated by him to any other person. These are known in the law as the non-assignable duties that the master owes to the servant. Among these non-assignable duties are the requirements that the master furnish and maintain a reasonably safe place to work, that he provide and maintain reasonably safe machinery and appliances, and to do such other things as are reasonably proper and sufficient for the safety and protection of servants in the discharge of their duties. This does not mean that the master is to furnish an absolutely safe place to work or absolutely safe machinery and appliances; it simply means that the master is bound under the law to furnish a reasonably safe place to work and reasonably safe machinery and appliances with which to work. If the master fails in this he fails
226 to perform the duty to the servant that the law requires of him." I charge you that.

"11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume any extraordinary risks incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured." I charge you that, in connection with what I have said about the assumption of risks.

"12. No hard and fast rule by which pecuniary damages may in all cases be measured is possible. The rule must differ according to the relationship between the parties plaintiff and decedent, according as the action is brought for the benefit of husband, wife and

minor children, or parent or minor children, for the loss of the services or support to which the beneficiary was legally entitled, or is brought for the benefit of the person whose damages consists only in the loss of a prospective benefit to which he was not legally entitled, and in addition, the amount of recovery depends on the age, character, earning capacity, habits and morals of the deceased, and in the case of a father in his care, attention and solicitude for his children." I charge you that.

"13. In reference to actual damages, it is a term employed judiciously, in the language of the Supreme Court of the United States:
'Not only to express the character of that loss to the beneficial
227 plaintiffs, which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' It is not dependent entirely upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assets or support of which the beneficiaries have been deprived. By pecuniary aid, or support, is meant not only money, but anything that can be valued in money. It includes, therefore, damages for the loss of the services of the husband, wife or child, as the case may be, and in the case of a surviving wife compensation for the loss of support and maintenance, or whatever financial benefit might reasonably have been expected from her husband had he continued living and uninjured. When the beneficiary is a minor child or children, recovery may be had for the loss of that care, counsel, training, education, and support which they might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation." I charge you that.

"14. The fact that an employee may have assumed the risk of one or two contributing causes of the injury will not defeat his right to recover, where the other cause is one for which the master is liable. The law is, that it is only necessary for the plaintiff to show that one of the co-operating causes of the injury was negligent act or omission for which the master is responsible." I charge you that.

"15. I have spoken of the preponderance or greater weight of the testimony, and I will illustrate to you its meaning. Take an imaginary scale or balance, and in one side place all of the testimony in favor of the plaintiff, on the other side place all of the evidence
against the plaintiff, and if the scale stands equally balanced
228 the plaintiff will have failed to make out her case. On the other hand, if the scale should tip just the least in favor of the side of the plaintiff, then her case will have been made out by what is known as a greater weight or preponderance, and she will be entitled to a verdict." I charge you that.

Now, gentlemen, I have come to the requests submitted to me by the defendant on propositions of law. Now give me your attention:

"1. Unless you find from the preponderance of the testimony that

Lewis H. Padgett was employed by the defendant in interstate commerce at the time of his injury and death, then your verdict must be for the defendant." I charge you that.

"2. Proof of the fact that the roundhouse was defective or insufficient, together with the fact that Lewis H. Padgett suffered injury and death because thereof, do not, standing alone, entitle plaintiff to recover. Plaintiff must go further and show, by the preponderance of the testimony, that such defects or insufficiencies were caused by the negligence of the defendant, its officers, agents or employees." I charge you that.

"3. There could be no negligence on the part of the defendant unless it was under a duty to plaintiff's intestate. The only duty alleged here is that due by defendant to plaintiff's intestate because of his employment as a locomotive engineer, while he was actually so employed, and if plaintiff's intestate was not so employed or actually discharging the duties of a locomotive engineer at the time of his death, then you must find for the defendant." I charge you that. I have already charged it anyway.

"4. Unless plaintiff's intestate went into the roundhouse at the time it is claimed he fell into the pit, in the discharge of some duty incumbent upon him as a locomotive engineer (in actual service at the time), then your verdict must be for the defendant." I charge you that.

229 "5. If Lewis H. Padgett went into the roundhouse when it is alleged he fell into the pit, for the purpose of sleeping upon his engine, or for any other purpose purely personal to himself, for his own accommodation, pleasure or profit, and not actually in the discharge of any duty owed by him to the defendant as a locomotive engineer, then your verdict must be for the defendant." I charge you that.

"6. In this case, the fact, if the jury finds such to be the fact, that Lewis H. Padgett came to his death by falling into a pit in the roundhouse of the defendant, in its yards at Cayce, carries with it no presumption of negligence on the part of the defendant. And it is an affirmative fact that the plaintiff, in this suit, founded on the alleged wrongful death of the said Lewis H. Padgett, should establish, by the preponderance or greater weight of the evidence, that the defendant has been guilty of negligence." I charge you that.

"7. It is not sufficient for the plaintiff to prove that the defendant may have been guilty of negligence; the evidence must point to the fact that it was, and if the testimony leaves the matter uncertain and shows that anyone of a half dozen things may have brought about the death, for some of which the defendant is responsible and for some of which it is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the defendant was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." I charge you that.

"8. The answer alleges that plaintiff's intestate went into the roundhouse when he knew, or should have known, that the same was in darkness and without lights, and contained dangerous pits

into which he might fall, and that he failed to watch out for and avoid said pit or pits, and that plaintiff's intestate was familiar with the roundhouse and well knew, or should have known, the danger of going therein in the darkness without exercising due care to
230 avoid falling into the pits, and that in these particulars plaintiff's intestate was guilty of negligence. If you find that plaintiff's intestate did or failed to do any one or more of the acts specified, and in these particulars, either did or failed to do something that a person of ordinary sense and prudence would not have done, or would have done in the exercise of ordinary care for his own protection, then you must find that the plaintiff's intestate was guilty of negligence, and if you find that such negligence of plaintiff's intestate, concurring and co-operating with the negligence of the defendant, was a proximate cause of his injury and death, then the damages awarded shall be diminished by you in proportion to the amount of negligence attributable to plaintiff's intestate, that is, the damages shall be diminished in proportion that the amount of negligence of plaintiff's intestate bore to the combined negligence of himself and defendant." I charge you that.

"8½. If Padgett, before the injury, had knowledge of the alleged defects in the roundhouse, or, if having a reasonable opportunity to inform himself, he ought to have known of such defects, he is presumed, by remaining in the company's service, to have assumed the risks if he voluntarily exposed himself to the dangers of such defects, and his beneficiaries cannot recover for his injury or death resulting therefrom; and his knowledge has the same effect whether the defendant was informed or ignorant of such defects. This rule applies with special force if the defects or dangers were obvious to the senses." I charge you that.

"9. The purpose of the Act of Congress under which this action was brought was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them, financially, by reason of the wrongful death. This cause of action in this case is one for the pecuniary damages resulting to the widow and children and for that alone. It includes,
231 and the jury can award no damages which Lewis H. Padgett, the deceased husband and father, might have recovered for his injuries if he had survived." I charge you that.

"10. The jury can only award such damages as will recompense the widow and children for pecuniary loss or damage resulting to them from the death of their husband and father. The phrase 'pecuniary loss or damage' means a loss or damage that can be measured by some standard—it means a material loss susceptible of pecuniary valuation." I charge you that.

"11. The jury cannot award any damages to solace the widow and the children for their grief or wounded feelings or for the loss of the love, society and companionship of their husband and father." I charge you that.

"12. The jury cannot award any punitive or exemplary damages, or damages by way of punishment, or smart money." I charge you

that. No punitive damages can be awarded in this case, for punitive damages are given by way of punishment. That cannot come into this case at all.

"13. There is no allegation or evidence of the loss of any services, care or advice by the widow for whose benefit this suit in part is brought, capable of being measured by some financial standard and so far as concerns this beneficiary, the jury cannot consider any loss of such services, care or advice, in addition to or beyond the actual pecuniary benefits that she might reasonably have expected had her husband continued to live." I charge you that.

The 14th I refuse (not given the jury).

"14. There is no evidence that the children beneficiaries might have reasonably received any services from their deceased father, Lewis H. Padgett, by way of care, counsel, training or education, such as can be measured by some financial standard, and which can now only be supplied by another for compensation, and the jury cannot consider such a loss as an element of damage."

232 "15. The jury cannot award any damages for the benefit of the beneficiary, Rosa Lee Padgett, who is married." You all know she was eliminated from the case, confining it to the widow and seven children.

"16. The actual money income that the widow and children might have reasonably expected cannot exceed such proportion as they may find that the deceased would, or might have, contributed out of his earnings to the average rate proven by the preponderance of the testimony to have been earned by him, after deducting a fair amount for his personal cost of living and reasonable personal expenditures for such length of time as the widow and children, respectively, might reasonably have expected to receive such money income from the deceased if he had continued to live. In ascertaining such income, they are to take into consideration the reasonable uncertainties of health and dangers from accidents which would have attended the deceased if he had lived. And they are also to take into consideration the ages of the children, respectively, at which, according to the customs of persons in the path of life occupied by the deceased, they would have been expected by their own labor to meet their own personal expenses." I charge you that.

"17. In ascertaining the proportion of the income of the deceased to be taken into consideration by them in determining the pecuniary loss of the beneficiaries, the jury need not necessarily take the entire earnings shown to have been made by the deceased, after deducting a fair amount for his personal cost of living and reasonable expenditures, for such length of time as the widow and children, respectively, might have reasonably expected to receive the money income from the deceased if he had continued to live, but they may consider whether a person in the path of life, and under the circumstances of the deceased, would have saved a part of his income as an accumulation. If so, that part should also be deducted, as a person has

233 the right to dispose of his accumulations as he may see fit, and there is no obligation on the part of a father to expend his

entire net income for the benefit of his wife and children." I charge you that.

Now, gentlemen, here comes the rules that you saw in that book that was introduced in evidence,—this book that contains the rules on the part of the engineers and the railroad company.

"18. Under Rule 21 of the contract between the engineers and the company, no engineer could call any engine 'his engine.' The engines belonged to the company, and it could furnish any engine for any run." I charge you that.

"19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty." I charge you that.

"20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in advance of the leaving time of the train for which he is called." I charge you that.

Now, gentlemen, that is the law applicable to this case as I see it. Now, you have heard the testimony, and you take the law as I have given it to you, and go into your jury room and find out whether the plaintiff is entitled to recover or not. Now, you cannot find over the amount asked for, if you find any amount, but you can find any amount under that that you see fit, if you find that she is entitled to anything.

You are not to decide this case on bias or prejudice; decide the case according to the law I have given you and the testimony that you have heard on the stand. If you find for the plaintiff, say we find for the plaintiff so much, so many dollars, and write it out and sign your name as foreman. If you find for the defendant, say we find for the defendant, and sign your name as foreman. Now, take the record.

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Verdict.

Thereupon the jury retired and subsequently brought in the following verdict: "We find for the plaintiff the sum of twenty thousand dollars," which was duly signed by the foreman and dated February 12, 1914.

Thereupon the defendant duly gave notice of a motion for a new trial on the minutes, which was entered by his Honor and subsequently heard by him, the defendant submitting the following grounds:

Grounds of Motion for New Trial.

The defendant moves for a new trial upon the minutes upon the following grounds:

1. Because his Honor, having charged defendant's first request, there is no evidence to support the verdict, and the verdict is contrary to the law.

2. Because his Honor, having charged defendant's second request, there is no evidence to support the verdict, and the verdict is contrary to the law.

3. Because his Honor, having charged defendant's third request, there is no evidence to support the verdict, and the verdict is contrary to the law.

4. Because his Honor, having charged defendant's fourth request, there is no evidence to support the verdict, and the verdict is contrary to the law.

5. Because his Honor, having charged defendant's fifth request, there is no evidence to support the verdict, and the verdict is contrary to the law.

The defendant also moves for a new trial nisi upon the following grounds:

1. Because the verdict is excessive.

235 2. Because his Honor having charged defendant's eighth request, it was mandatory on the jury to diminish the damages in proportion to the amount of negligence attributable to plaintiff's intestate, as herein stated, and from the amount of the verdict it appears that the jury did not make any deduction on account of the negligence of plaintiff's intestate, when on the entire evidence in the case, the only inference was that plaintiff's intestate was guilty of contributory negligence, and the verdict should now be reduced as a matter of law in a proportionate amount.

C. M. EFIRD,
LYLES & LYLES,
Attorneys for Defendant.

This motion was denied upon all grounds, and his Honor signed and filed a general order to this effect, specifying no grounds or reasons.

Entry of Judgment.

Thereafter, on the fifth day from the rising of the Court, judgment was duly entered in favor of plaintiff on the verdict for $20,000 and costs, and within ten days from the rising of the Court, the defendant duly served the following

Notice of Intention to Appeal.

Please take notice that the defendant intends to appeal to the Supreme Court of South Carolina from the judgment in favor of the plaintiff entered or to be entered on the verdict of the jury, upon exceptions to be hereafter served upon you, together with the case for appeal.

C. M. EFIRD,
LYLES & LYLES,
Attorneys for Defendant.

236 To W. Boyd Evans, Esq., Messrs. Melton & Sturkie, W. H. Sharpe, Esq., and G. Bell Timmerman, Esq., Attorneys for Plaintiff.

February 21st, 1914.

Exceptions.

Thereafter the time being duly extended, this case was duly served and agreed upon together with the following exceptions:

Please take notice that on the appeal to the Supreme Court from the judgment entered in the above cause, the defendant will rely upon the following exceptions:

I. That his Honor erred in refusing the first ground of the defendant's motion for the direction of a verdict, which was as follows:

"1. Because there is an entire failure of evidence to support the material allegations of the complaint."

When for the reasons therein stated, his Honor should have granted said motion and directed the verdict.

II. That his Honor erred in refusing the second ground of the defendant's motion for the direction of a verdict, which was as follows:

"2. Because the plaintiff has failed to produce evidence admitting of the inference that Lewis H. Padgett was employed in interstate commerce at the time of his injury and death."

When for the reasons therein stated, his Honor should have granted said motion and directed the verdict.

III. That his Honor erred in refusing the third ground of the defendant's motion for the direction of a verdict, which was as follows:

"3. Because the entire evidence does not admit of the inference
that Lewis H. Padgett, plaintiff's intestate, was employed in
237 interstate commerce at the time of his injury and death."

When for the reasons therein stated, his Honor should have granted said motion and directed the verdict.

IV. That his Honor erred in refusing the fourth ground of the defendant's motion for the direction of a verdict, which was as follows:

"4. Because the entire evidence does not admit of the inference that there was any negligence on the part of the defendant, its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate."

When for the reasons therein stated, his Honor should have granted said motion and directed the verdict.

V. Because his Honor erred in ruling, upon refusing defendant's motion for the direction of a verdict, that there was a scintilla of testimony somewhere in the record and erred in overruling said motion, whereas his Honor should have ruled that there was not a scintilla of testimony to go to the jury.

a. Because the entire evidence did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury and death.

b. Because the entire evidence did not admit of the inference that the defendant, its agents, servants and employees had been

*b*uilty of any negligence proximately causing or contributing to the death of plaintiff's intestate, and

c. Because the only inference of which the entire testimony was capable was that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death.

VI. Because his Honor should have granted defendant's motion for a new trial upon the minutes on its ground numbered one, as follows:

238 "1. Because his Honor having charged defendant's first request, there is no evidence to support the verdict and the verdict is contrary to the law."

Defendant's first request therein referred to being as follows:

"1. Unless you find from the preponderance of the testimony that Lewis H. Padgett was employed by the defendant in inter-state commerce at the time of his injury and death, then your verdict must be for the defendant."

The error being that it did not appear from the testimony that Lewis H. Padgett was employed by the defendant in interstate commerce at the time of his injury and death, and, therefore, under this charge, the verdict could only have been for the defendant, and a new trial should have been granted as a matter of law.

VII. Because his Honor should have granted defendant's motion for a new trial on the minutes on its ground numbered two, as follows:

"2. Because his Honor having charged defendant's second request, there is no evidence to support the verdict and the verdict is contrary to the law."

Defendant's second request therein referred to being:

"2. Proof of the fact that the roundhouse was defective or insufficient, together with the fact that Lewis H. Padgett suffered injury and death because thereof, do not, standing alone, entitle plaintiff to recover. Plaintiff must go further and show by the preponderance of the testimony that such defects or insufficiencies were caused by the negligence of the defendant, its officers, agents or employees."

The error being that since there was no testimony showing that any defects or insufficiencies that may have existed in the roundhouse were caused by the negligence of the defendant, then, under this charge, the verdict could only have been for the defendant, and a new trial should have been granted as a matter of law.

239 VIII. Because his Honor should have granted the defendant's motion for a new trial upon the minutes made upon its ground numbered three, as follows:

"3. Because his Honor having charged defendant's third request, there is no evidence to support the verdict and the verdict is contrary to the law."

The defendant's request numbered three therein referred to being:

"3. There could be no negligence on the part of the defendant unless it was under a duty to plaintiff's intestate. The only duty alleged here is that due by defendant to plaintiff's intestate because

of his employment as a locomotive engineer, while he was actually so employed, and if plaintiff's intestate was not so employed or actually discharging the duties of a locomotive engineer at the time of his death, then you must find for the defendant."

The error being that no reasonable inference could be drawn from the testimony that plaintiff's intestate was employed as a locomotive engineer or actually discharging the duties of such at the time of his death, and, therefore, under this charge, the verdict could only have been for the defendant, and a new trial should have been granted as a matter of law.

IX. Because his Honor should have granted defendant's motion for a new trial on the minutes on its grounds numbered four, as follows:

"4. Because his Honor having charged defendant's fourth request, there is no evidence to support the verdict and the verdict is contrary to the law."

Defendant's request numbered four therein referred to being:

"4. Unless plaintiff's intestate went into the roundhouse at the time it is claimed he fell into the pit, in the discharge of some duty incumbent upon him as a locomotive engineer (in
240 actual service at the time), then your verdict must be for the defendant."

The error being that no reasonable inference could be drawn from the testimony that plaintiff's intestate went into the roundhouse, at the time it was claimed he fell into the pit, in the discharge of some duty incumbent upon him as a locomotive engineer, in actual service at the time, and, therefore, under this charge, the verdict could only have been for the defendant, and the motion for a new trial should have been granted as a matter of law.

X. Because his Honor should have granted defendant's motion for a new trial on the minutes on its ground numbered five, as follows:

"5. Because his Honor having charged defendant's fifth request, there is no evidence to support the verdict and the verdict is contrary to the law."

Defendant's fifth request therein referred to being:

"5. If Lewis H. Padgett went into the roundhouse when it is alleged he fell into the pit, for the purpose of sleeping upon his engine or for any other purpose purely personal to himself, for his own accommodation, pleasure, or profit, and not actually in the discharge of any duty owed by him to the defendant as a locomotive engineer, then your verdict must be for the defendant."

The error being that the only inference from the testimony was that Lewis H. Padgett went into the roundhouse at the time he came to his death for some purpose personal to himself and not actually in the discharge of any duty owed by him to the defendant as a locomotive engineer, and, therefore, under this charge, the verdict could only have been for the defendant, and the motion for a new trial should have been granted as a matter of law.

XI. That his Honor erred in refusing the fifth ground of the

defendant's motion for the direction of a verdict, which was as follows:

241 "5. Because, upon the entire evidence, the only inference is that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death."

When for the reasons therein stated, his Honor, should have granted said motion and directed the verdict.

XII. That his Honor erred in charging plaintiff's requests, numbered six and eleven, as follows:

"6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment and as this case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier."

"11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume an extraordinary risk incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured."

The error being:

(*a.*) That according to the rule of assumption of risks applicable under the Federal Employers' Liability Act, the servant does assume the risks or hazards incident to the negligence of the officers, agents or employees of the common carrier employer under certain circumstances, and in the case at bar, if plaintiff's intestate

242 knew, or if having a reasonable opportunity to inform himself, he ought to have known, as a man of ordinary intelligence, of the alleged defects in the roundhouse; that is, that it was unlighted, incomplete, and contained dangerous pits, all of which and the risks and dangers thereof being obvious to the senses, and yet he voluntarily remained in the service without complaint, objection or promise to him to correct, and exposed himself thereto, then he waived the duty owed him by his master to this extent and assumed the risks of such defects, notwithstanding that they may have been due to the negligence of defendant. And his Honor, in charging these requests, deprived defendant of this defense which the evidence strongly, if not conclusively, established.

(*b.*) The said requests, together with his Honor's comments thereon, were inconsistent with and repugnant to defendant's request numbered eight and one-half, as follows:

"8½. If Padgett, before the injury, had knowledge of the alleged defects in the roundhouse, or, if having a reasonable op-

portunity to inform himself, he ought to have known of such defects, he is presumed, by remaining in the company's service, to have assumed the risks if he voluntarily exposed himself to the dangers of such defects, and his beneficiaries cannot recover for his injury or death resulting therefrom, and his knowledge has the same effect whether the defendant was informed or ignorant of such defects. This rule applies with special force if the defects or dangers were obvious to the senses." And by charging these inconsistent and irreconcilable propositions upon this fundamental and material issue his Honor misled and confused the jury and deprived defendant of its right to have the jury consider the evidence tending to establish this defense under proper instructions.

C. M. EFIRD,
LYLES & LYLES,
Defendant's Attorneys.

Addressed to Plaintiff's Attorneys of Record.

243 It is stipulated between counsel of record that the above and foregoing two hundred and forty-two pages shall constitute the record for the hearing of this cause in the Supreme Court, and that the filing of the same shall constitute the return and a full compliance with all statutes and rules governing all appeals and returns, and that the filing of any return in the Circuit Court is waived.

(Sd.) W. BOYD EVANS,
Attorney for Respondent.

(Sd.) LYLES & LYLES,
Attorney- for Appellant.

244 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit, Lexington County.

No. 102.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,
against
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Opinion by T. B. Fraser, A. J.

Lewis H. Padgett was an engineer on the Seaboard Air Line Railway. He had been running a freight train but in the first part of January, 1913, he was promoted to the passenger service, and was given a run between Columbia, S. C., and Savannah, Ga., and so was engaged in inter-state commerce. When the train reached Columbia, the engine was detached and carried to the yard at Cayce, a station near Columbia. The engineer ran his engine into the yard near the round house and left it upon a siding in the yard. He left his engine

about 10:30 on the 11th day of January, 1913. Mr. Padgett's regular run would have required him to leave Columbia at 5:10 A. M. on the morning of the 12th. He was detained in the yard for a while so that he might take another train, if necessary. It was not necessary and he was notified that he would make his regular run. The Company had built a small boarding house at Cayce for the convenience of its trainmen, but let out the management of the house to a private party. When Mr. Padgett was notified that he would be required to make his regular run, he went to the boarding house and found it full. He then went back on the yard, into the round house and into an engine and went to sleep. At about 4:30 o'clock on the morning of the 12th, the engine in which Mr. Padgett was asleep was run out of the round house down to the coal chute, to be supplied with coal, water &c. for its trip. At the coal chute Mr. Padgett waked and got off the engine. He inquired where his engine was and was told it was in the round house on track No. 3. The last seen of Mr. Padgett alive, he was going in the direction of the round house. When it came time to call him he could not be found and the engine went off without him. A little later
245 he was found in an open, uncovered pit in the round house dead. His engine had been standing with the step over the pit. The pit was a little over eight feet deep. There *was* no lights in the round house.

Suit was brought in the behalf of his widow and dependent children for negligence under the Federal Employers' Liability Act. The defendant answered denying negligence. It denied that the deceased was engaged in interstate commerce at the time of his death. It pleaded that the deceased was a trespasser in the round house, contributory negligence and assumption of risk. The judgment was for the plaintiff and the defendant appealed on numberous exceptions, but argues three propositions.

"Padgett did not come to his death while employed in interstate commerce."

The defendant claimed that the rules required the engineer to leave his engine in the yard, that he was then to go into the machinery room and "write off" and leave a memorandum as to repairs. That he had no duty that called him into the round house. That a "hostler" then took charge of the engine and if any repairs were to be made the hostler took it into the round house where the machinists made the repairs and the hostler went to the round house for the engine, took it out and carried it off for coal, water, &c. and put it back on the side track. That the engineer then inspected it and if it was found to be in proper condition he took charge of it and went out on his run. That Mr. Padgett ended his service at 10:30 o'clock on the night of the 11th and was not required to go to work until about 5:30 on the morning of the 12th, and he was killed between those hours, hence he was not engaged in the service of the railway when killed.

The defendant asked for a direction of verdict on the ground that there was no evidence that the deceased was engaged in inter-state

commerce at the time of his death. This was refused. The exact question is, for what purpose did Padgett go into the round house? If he went there for any purpose of his own, or there is an utter failure of evidence to prove any circumstances from which his purpose can be inferred, then the verdict ought to have been directed.

246 There was evidence to show that when the engine came into the yard that night, it had a hot box and needed repair. That the rule required the engineer to inspect his engine only about a half hour before the leaving time. There was no intimation that he was forbidden to inspect it before. There was evidence that if the inspection was made at the required hour and it was found that the repairs had not been made or improperly made, then the engine would have to be returned to the round house to have the repairs properly made. That the repairs would take time and the time necessary would have to be taken even if it delayed the departure of his train. The evidence is circumstantial, but conclusions may be drawn from circumstances. On the trial appellant took the position that the purpose must be inferred from the circumstances.

The plaintiff offered to prove Mr. Padgett's declarations, but, on appellant's motion, the statements were ruled out because his Honor said the purpose must be inferred from circumstances. In this ruling the appellant acquiesced and of it there is no complaint. So the question is, are there circumstances from which his purpose can be inferred? It is not altogether fair to try a case on one theory and dismiss it on another. Mr. Padgett had recently been promoted to a passenger run. Repairs had to be made. He was already awake and dressed a few minutes before he was to be called. He was on the yard with his personal preparations made. He asked where his engine was placed and was told by the hostler in charge that it was on track No. 3 in the round house and started in that direction. Of course he had the right, under the rules, to loaf around until the exact minute that the rule required him to take his engine, and if error had occurred in the mechanical department, he had the right to send the engine back and delay the train and say to his superiors, the rule does not require any more and I am not going to do any more than the strict rule requires. Would a faithful servant be likely to do that? That was question for the jury. Would a man recently promoted stand upon the strict letter of the rule. That was a question for the jury. There is a suggestion that Mr.

247 Padgett went to his engine to sleep. The time at his disposal was short. He did not leave in the office a note as to where he could be found. He went to sleep on an engine that left earlier than he was required to be called. He was found and waked early. The saying "the engines belong to the Company but the runs belong to the men" is much relied upon to show that engines might be changed. The statement, however, is made that while a change could be made, yet the general practice was to allow the use of the same engine. The jury were told of the time that would elapse between the time Mr. Padgett was waked and the time of his regular call. Was it probable that he could use that time in sleep or in inspecting

the engine to see that there was no unnecessary delay in doing his work? These were questions for the jury.

If they inferred from the circumstances that Mr. Padgett was doing the work that was required of him, not at the time it was required, but at a time when it was not forbidden, then they could conclude that he was engaged in interstate commerce, and under the protection of the Federal Statute His Honor could not have directed a verdict on the ground that there was no evidence from which it could be inferred that Mr. Padgett was engaged at the time of his death in interstate commerce.

II. "No evidence tending to show negligence on the part of the defendant proximately causing the death of P*al*intiff's intestate."

There was an open pit over eight feet deep in the unlighted round house. The step of this engine was over the open pit. "Hostlers" and their helpers were required to go in and get on this engine over the pit. The only lights available were torches. Mr. Padgett's unlighted torch was in his engine. Was this negligence? It was a question for the jury.

III. Did Mr. Padgett assume the risk?

In Seaboard Air Line Railway vs. Horton, Advance opinions U. S. Supreme Court, June 1, 1914, pg. 640, that court says:

"Such dangers as are nominally and necessar-y incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But
248 risk of another sort not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious, that an ordinarily prudent per-on under the circumstances would have observed and appreciated them."

Mr. Padgett's run brought him *to* into Cayce at night and he left early in the morning. His usual duties did not require him to go and there is no reasonable inference from the testimony that he knew of the open pit or of the danger of open pits in round houses where some men were required to go and others might have occasion to go.

Appellant further says that the charge was inconsistent in that the p*al*intiff's 6th and 11th request- to charge *was* inconsistent with the defendant's 8½ and his Honor charged the three. The rule that a judge shall not charge inconsistent propositions is a good one but, that it is always reversible error, is not true. It must appear that the jury may have been mislead to appellant's injury. The 6th and 11th requests of the plaintiff were based upon a finding of negligence by the jury. When his Honor charged Appellant's request numbered 8½, he left it to the jury to say whether Mr. Padgett knew or ought to have known of the open pit. There was no word of testimony to show that Mr. Padgett knew or ought to have known

of the open pit. If his Honor erred, it was in favor of the Appellant and it can not complain of an error favorable to itself.

Judgment affirmed.

We concur:
R. C. WATTS, *A. J.*

I concur in the result:
EUGENE B. GARY, *C. J.*

I dissent.
D. E. HYDRICK, *A. J.*

I dissent, see dissenting opinion.
GEO. W. GAGE, *A. J.*

249 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1914.

CLARA V. PADGETT, Administratrix of the Estate of Lewis Padgett, Deceased, Respondent,
against
SEABOARD AIR LINE RAILWAY, Appellant.

Dissenting Opinion.

GAGE, *J.:*

I have a settled conviction against the truth of the verdict herein. There is no sufficient testimony upon which to rest it.

I therefore dissent from the majority opinion.

It is true "the exact question is, for what purpose did Padgett go into the round house?

If he went there for any purpose of his own, or there is an utter failure of evidence to prove any circumstances from which his purpose can be inferred, then the verdict ought to have been directed."

That is to say, the engineer Padgett must be brought within the terms of the Federal Statute; there must be testimony tending to establish the fact that the engineer went into the roundhouse on the Company's business.

A careful review of the plaintiff's testimony satisfies me that it does not tend to prove that conclusion, but the contrary, that the engineer went into the round h u-e upon his own business, out of the hours, against the rules and the practice, and to unwarrantably sleep in his engine.

The Company is therefore not liable for his death.

[Endorsed:] 8981. Affirmed. State of South Carolina. In the Supreme Court, 11th Circuit, Lexington County. Clara V. Padgett, Resp'd't v. S. A. L. R'w'y. Opinion by T. B. Fraser, A. J. We concur, R. C. Watts, A. J. I concur in the result, Eugene B. Gary,

C. J. I dissent, D. E. Hydrick, A. J. I dissent. See dissenting opinion. Geo. W. Gage, A. J. Filed Supreme Court of S. C. Nov. 18, 1914. U. R. Brooks, clerk.

250 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Petition for Writ of Error.

Seaboard Air Line Railway, the above named defendant-appellant, respectfully shows that on the eighteenth day of November, 1914, the Supreme Court of South Carolina, which is the highest Court in the State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, was plaintiff, and your petitioner, Seaboard Air Line Railway, was defendant.

In said action, a right, privilege and immunity was duly and specially set up and claimed by your petitioner under the Constitution and under a statute of the United States, and the decision of the Supreme Court of South Carolina was against the right, privilege and immunity so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels ag-
251 grieved by the final decision of the Supreme Court of South Carolina in rendering the judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of South Carolina for the correcting of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record of the proceedings herein in said Supreme Court of South Carolina be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of South Carolina herein may be reversed and annulled.

LYLES & LYLES,
J. B. S. LYLES,
Attorneys for Seaboard Air Line Railway.

STATE OF SOUTH CAROLINA,
Supreme Court:

Let the writ of error above prayed for issue upon the execution of a bond by Seaboard Air Line Railway, payable to Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, in

the sum of twenty-five thousand dollars, such bond, when approved, to act as a super-sedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

November 25th, 1914.

252 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,
vs.
SEABORAD AIR LINE RAILWAY, Defendant-Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Seaboard Air Line Railway, the above named defendant-appellant, and files herewith its petition for a writ of error and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

This was a civil action commenced on June 20th, 1913, by the plaintiff, Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, for the benefit of herself and eight dependent children, against Seaboard Air Line Railway, defendant, under the Federal Employers' Liability Act of Congress, to recover damages for the death of said intestate, alleged to have been caused by the negligent and wrongful acts of the defendant on January 12th, 1913, while said intestate was employed by defendant in the capacity of a locomotive engineer in interstate commerce. The complaint
253 alleged that at the time of his death, plaintiff's intestate was discharging his duties as an interstate employee and was in the employment and service of the defendant as a locomotive engineer running between the City of Savannah, Georgia, and Cayce, Lexington County, South Carolina, and that on the night of his death, the said intestate in the discharge of his duties as such locomotive engineer in interstate service, went into the roundhouse of the defendant in its Cayce yards; that the round house was unlighted and there was therein a deep and unprotected pit, due to the negligence and carelessness of the defendant, and that as a consequence thereof, plaintiff's intestate fell into said pit and was instantly killed.

The answer denied that intestate was employed as an engineer at the time of his death, in interstate service or otherwise, or that he went into the roundhouse in the performance of any duty imposed upon him as such; further denied the allegations of negligence and set up the defenses of contributory negligence and assumption of risks.

The cause came on for trial before the Court of Common Pleas and a jury in Lexington County at the February, 1914, term. At

the conclusion of all of the testimony, the defendant moved for the direction of a verdict in its favor upon the ground that the entire testimony did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury and death; and upon the ground that the entire evidence did not admit of the inference that the defendant had been guilty of negligence in the particulars alleged in the complaint, and upon the further ground that the only inference to be drawn from the testimony was that the plaintiff assumed the risks of the dangers and defects causing
254 his death. This motion was overruled by the Circuit Court and the cause submitted to the jury, who returned a verdict in favor of plaintiff for twenty thousand dollars. Thereupon, the defendant duly made a motion for a new trial upon the minutes, repeating the legal grounds upon which its motion for the direction of a verdict was made. This was refused. Thereupon, defendant appealed from said judgment to the Supreme Court of South Carolina, and on November 18th, 1914, said Supreme Court filed its judgment affirming the judgment of the Circuit Court.

Seaboard Air Line Railway, defendant-appellant, respectfully assigns as errors in the record and proceedings in this cause in the Supreme Court of South Carolina the following:

The Supreme Court of South Carolina erred in the construction and application to the facts in this case of the Federal Employers' Liability Act, a statute of the United States approved on the 22nd day of April, 1908, and the Act amendatory thereto, approved on the 5th day of April, 1910.

That by these errors, the Supreme Court of South Carolina decided against certain titles, rights, privileges and immunities claimed under said statutes which were duly and specially set up and claimed by defendant (plaintiff in error) in these proceedings.

The said errors are more particularly set forth as follows:

1. That the Supreme Court of South Carolina erred in holding and deciding that there was evidence that plaintiff's intestate was employed in interstate commerce at the time of his injury and death, within the meaning of said Federal Act, and erred in affirm-
255 ing the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the ground:

"2. Because the plaintiff has failed to produce evidence admitting of the inference that Lewis H. Padgett was employed in interstate commerce at the time of his injury and death", and the further ground:

"3. Because the entire evidence does not admit of the inference that Lewis H. Padgett, plaintiff's intestate, was employed in interstate commerce at the time of his injury and death":

when said Supreme Court of South Carolina should have reversed the ruling and judgment of said Circuit Court and itself ordered a verdict in defendant's (plaintiff in error's) favor upon these grounds. These were defendant's exceptions II and III.

2. That the Supreme Court of South Carolina erred in affirming

the ruling of the Circuit Court which denied to defendant (plaintiff in error) a new trial upon the minutes, upon the following ground: That the Circuit Court having instructed the jury at defendant's (plaintiff in error's) request, as follows:

"4. Unless plaintiff's intestate went into the roundhouse at the time it is claimed he fell into the pit, in the discharge of some duty incumbent upon him as a locomotive engineer (in actual service at the time), then your verdict must be for the defendant":

There was no evidence to support a verdict for plaintiff in conformity with this charge, and the new trial should have been granted as a matter of law. This was defendant's exception IX.

3. That the Supreme Court of South Carolina having concluded from the testimony that under the rules and regulations gov-
256 erning the employment of plaintiff's intestate, it was one of the duties of his employment to inspect his engine after the same had been brought out of the roundhouse by the hostler and placed upon one of the tracks outside of the roundhouse, at a time thirty minutes in advance of the leaving time of the train that plaintiff's intestate was to take out as an engineer, but that no duty of plaintiff's intestate's employment required or expected him to go into the roundhouse in the dark, at an hour much earlier than the time of inspection required by such rule and regulation, in order to there inspect said engine, erred in holding and deciding that it was an issue in the case for the jury to decide whether the plaintiff's intestate in going into the roundhouse under such circumstances, although it was admitted that he was a volunteer in so doing, did so in the discharge of one of the duties of his employment as a locomotive engineer employed in interstate commerce, and said Supreme Court erred in affirming and upholding the action of the Circuit Court in submitting this issue to the jury.

4. That the Supreme Court of South Carolina erred in holding and deciding that there was evidence of negligence on the part of defendant (plaintiff in error), its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate, within the meaning of said Federal Act, and erred in affirming the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the ground:

"4. Because the entire evidence does not admit of the inference that there was any negligence on the part of the defendant, its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate":

257 when said Supreme Court of South Carolina should have reversed said ruling and judgment of the Circuit Court and itself ordered a verdict in defendant's (plaintiff in error's) favor upon this ground. This was defendant's exception IV.

5. That the Supreme Court of South Carolina erred in affirming the ruling of the Circuit Court which denied to the defendant (plaintiff in error) a new trial upon the minutes, upon the following

ground: That the Circuit Court, having instructed the jury at the request of defendant (plaintiff in error):

"3. There could be no negligence on the part of the defendant unless it was under a duty to plaintiff's intestate. The only duty alleged here is that due by defendant to plaintiff's intestate because of his employment as a locomotive engineer, while he was actually so employed, and if plaintiff's intestate was not so employed or actually discharging the duties of a locomotive engineer at the time of his death, then you must find for the defendant":

There was no evidence to support a verdict in favor of plaintiff in conformity with this charge, and a new trial should have been granted, as a matter of law. This was defendant's exception VIII.

6. That the Supreme Court of South Carolina erred in holding and concluding that there was evidence tending to show negligence on the part of the defendant (plaintiff in error) proximately causing the death of plaintiff's intestate, because "there was an open pit over eight feet deep in the unlighted roundhouse", and because "the step of this engine was over the open pit" and because "hostlers and their helpers were required to go in and get on this engine over this pit", and because "the only lights available were torches", and because "Mr. Padgett's unlighted torch was in his engine",
258 and said Court erred in holding and concluding that the question whether this was negligence was one for the jury, when said Court had concluded, as the undisputed evidence shows, that although the duties of the hostlers, their helpers and machinists required these classes of employees to go into the roundhouse, there were no duties requiring engineers to go into the roundhouse and the defendant (plaintiff in error) could not have reasonably anticipated that plaintiff's intestate, an engineer, would undertake to go into the roundhouse, in the absence of any duty requiring or occasioning him so to do, and the defendant (plaintiff in error) was not, therefore, under any duty to plaintiff's intestate to have the roundhouse lighted, or otherwise made safe, or the pit covered or protected, and in the absence of such a duty, there could have been no negligence on the part of the defendant (plaintiff in error) towards plaintiff's intestate, within the meaning of the Federal Employers' Liability Act.

7. That the Supreme Court of South Carolina erred in holding and deciding that the entire evidence admitted of any other reasonable inference than that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death, within the meaning of said Federal Act, and erred in affirming the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the ground:

"5. Because, upon the entire evidence, the only inference is that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death." This was defendant's exception XI.

8. That the Supreme Court of South Carolina erred in upholding the Circuit Court in instructing the jury as follows:
259 "6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment and as this

case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier."; and again

"11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume an extraordinary risk incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured."

This is assigned as error because, according to the rule of assumption of risks applicable under the Federal Employers' Liability Act, the servant does assume the risks or hazards incident to the negligence of the officers, agents or employees of the common carrier employer under certain circumstances, and the Supreme Court of South Carolina further erred in holding that there was no testimony in this case to show such circumstances, to wit, that plaintiff's intestate knew or ought to have known of the alleged defects in the roundhouse, which was the dangers of which plaintiff complained, and
260 voluntarily subjected himself to. This was defendant's exception XII*a*.

9. That the Supreme Court of South Carolina erred in holding and deciding that defendant (plaintiff in error) was not prejudiced by the instructions given to the jury by the Circuit Court at plaintiff's request, as follows:

"6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment and as this case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier."; and again

"11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume an extraordinary risk incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured.",

in connection with the following instructions given to the jury by the Circuit Court at defendant's request:

"8½. If Padgett, before the injury, had knowledge of the alleged defects in the roundhouse, or, if having a reasonable opportunity to inform himself, he ought to have known of such defects, he is presumed, by remaining in the company's service, to have assumed the risks if he voluntarily exposed himself to the dangers of such defects, and his beneficiaries cannot recover for his injury or death resulting therefrom, and his knowledge has the same effect whether the defendant was informed or ignorant of such defects. This rule applies with special force if the defects or dangers were obvious to the senses.", and erred in holding and deciding that although these charges were inconsistent and there was error, that this error was in favor of defendant (plaintiff in error), and that it could not complain of an error favorable to itself. This was defendant's exception XII*b*.

Wherefore, for these and other manifest errors appearing in the record, the said Seaboard Air Line Railway, defendant, (plaintiff in error) prays that this judgment of the Supreme Court of South Carolina, filed November 18th, 1914, be reversed, set aside and held for naught, and that a judgment be rendered for this defendant (plaintiff in error) granting its rights under the Constitution and Statutes of the United States, and the defendant (plaintiff in error) also prays for judgment for costs in its favor.

LYLES & LYLES,
J. B. S. LYLES,
Attorneys for Seaboard Air Line Railway, Defendant (Plaintiff in Error).

[Endorsed:] State of South Carolina. In the Supreme Court. Clara V. Padgett, Administratrix, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Petition for Writ of Error, Order of Allowance, Assignment of Errors, and Prayer for Reversal. Lyles & Lyles, J. B. S. Lyles, Attorneys for Seaboard Air Line Railway. Filed Supreme Court of South Carolina, November 28, 1914. U. R. Brooks, Clerk South Carolina Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the State in which a decision could be had in the said suit between Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, and Seaboard Air Line Railway, a corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title,

right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to
264 the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 25th day of November, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern District So. Ca.]

RICH. W. HUTSON,
Clerk District Court of the United States,
District of South Carolina.

Allowed:

EUGENE B. GARY,
Chief Justice of the Supreme
Court of South Carolina.

265 [Endorsed:] State of South Carolina, in the Supreme Court. Clara v. Padgett, Administratrix of the estate of Lewis H. Padgett, deceased, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Writ of Error. Lyles & Lyles, J. B. S. Lyles, Attorneys for Seaboard Air Line Railway. Filed Supreme Court of South Carolina, November 28, 1914. U. R. Brooks, Clerk South Carolina Supreme Court.

266 The Supreme Court of South Carolina.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Defendant in Error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a consolidated corporation of the States of Virginia, North Carolina and South Carolina, the principal office of which is in the City of Portsmouth, in the State of Virginia, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and

firmly bound unto Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, of the State of Georgia, in the full and just sum of twenty-five thousand dollars ($25,000), for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves and each of our successors and assigns firmly by these presents.

Sealed with our Seals, and dated this twenty-third day of November, in the year 1914.

Whereas, lately at a hearing had before the Supreme Court of South Carolina, in a suit pending in said Court between the said Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, as plaintiff-respondent, and said Seaboard Air Line Railway, as defendant-appellant, a final judgment was rendered against the said Seaboard Air Line Railway, and said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme
267 Court of the United States to reverse said final judgment:

Now, therefore, the condition of this obligation is such that if the Seaboard Air Line Railway, as plaintiff in error, shall prosecute its said writ of error, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] SEABOARD AIR LINE RAILWAY,
By W. J. HARAHAN, *President.*

Attest:
ROBERT L. NUTT,
Assistant Secretary.

Witness as to W. J. Harahan:
C. V. FLEMING.
WM. A. BRAMBERRY.

Witness as to R. L. Nutt:
JOS. A. RAWLES.
C. A. MORGAN, JR.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By JOHN T. SLOAN, *Attorney in Fact.*

Attest:
JAMES A. CATHCART,
General Agent.

In the presence of:
W. H. GOODING.
MARY E. WINGARD.

STATE OF VIRGINIA,
City of Norfolk:

Personally appeared C. V. Fleming, before me a Commissioner of Deeds for the State of South Carolina in the State of Virginia, and

made oath that he was present and saw W. J. Harahan, President, sign, affix the corporate seal of Seaboard Air Line Railway, and as the act and deed of said corporation, deliver the within written instrument; and that he with Wm. A. Bramberry, witnessed the execution thereof.

C. V. FLEMING.

Subscribed and sworn to before me this 23rd day of November, A. D. 1914.

[SEAL.]

S. B. PARKINSON,
Commissioner of Deeds for the State of South Carolina in the State of Virginia.

268 STATE OF SOUTH CAROLINA,
Richland County:

Personally appears Mary E. Wingard, who, on oath says that -he saw Fidelity & Deposit Company of Maryland by John T. Sloan, its attorney in fact, and James A. Cathcart, General Agent, sign, seal, and, as its act and deed, deliver the above and foregoing instrument for the uses and purposes therein mentioned, and that -he, with W. H. Gooding, witnessed the execution thereof.

MARY E. WINGARD.

Sworn to and subscribed before me, this 25th day of November, 1914.

J. HUGHES COOPER, [L. S.]
Notary Public for South Carolina.

Bond approved and to act as supersedeas:
November 25, 1914.

EUGENE B. GARY,
Chief Justice Supreme Court, South Carolina.

Bond agreed to be satisfactory:

W. BOYD EVANS,
Attorney for Defendant in Error.

269 [Endorsed:] State of South Carolina, in the Supreme Court. Clara V. Padgett, Administratrix, etc., Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Bond. Filed Supreme Court of S. C. 28 Nov., 1914. U. R. Brooks, Clerk.

270 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of South Carolina, this the 25th day of November, 1914.

[Seal Supreme Court of South Carolina.]

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:
U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

STATE OF SOUTH CAROLINA,
Richland County:

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States, this 27th day of November, 1914.

W. BOYD EVANS,
Attorney of Record for Clara V. Padgett, Admx. of the Estate of Lewis H. Padgett.

271 [Endorsed:] Supreme Court of the U. S. State of South Carolina, in the Supreme Court. Clara V. Padgett, Administratrix, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Citation. Lyles & Lyles, J. B. S. Lyles, Attorneys for Seaboard Air Line Railway. Filed Supreme Court of South Carolina, November 28th, 1914. U. R. Brooks, Clerk South Carolina Supreme Court.

272 SUPREME COURT OF THE STATE OF SOUTH CAROLINA, *ss:*

Certificate of Lodgment.

I, U. R. Brooks, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on November 28, 1914, in the matter of Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, against the Seaboard Air Line Railway, a corporation:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth—one for plaintiff, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Columbia, South Carolina, this November 28, 1914.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

273 SUPREME COURT,
State of South Carolina, ss:

Authentication of Record.

I, U. R. Brooks, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 272, inclusive, are a true, full and complete transcript of the record and proceedings in the case of Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, plaintiff-respondent, against Seaboard Air Line Railway, defendant-appellant; and also, of the opinions of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Columbia, South Carolina, this November 28, 1914.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

274 UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of South Carolina, in the City of Columbia, this November 28, 1914.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

Costs of Suit.

Plaintiff's Costs $50.50, paid by Seaboard Air Line Railway.
Defendant's Costs $264.50, paid by Seaboard Air Line Railway.
Costs of Transcript $59.00, paid by Seaboard Air Line Railway.

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

275 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, Plaintiff-Respondent,

vs.

SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Præcipe.

To U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina.

SIR: The plaintiff in error, defendant-appellant above entitled, requests that you incorporate into the transcript of the record which you are to send to the Supreme Court of the United States, in accordance with the directions contained in the writ of error in the above stated cause, now on file in your office, and that you omit from said transcript the portions indicated below:

1. Include that portion of the printed case for appeal, commencing at the beginning on page 1, down through the conclusion of the testimony of the witness, G. M. Cline, concluding with the words "No cross," at page 21, f. 83.

2. Omit that portion of the printed case for appeal beginning with the words "W. L. Vause (white), sworn." on page 21, f. 83, down through and including the words "The Court: It is not admissible. I rule it out." on page 22, at f. 86.

3. Include that portion of the printed case for appeal
276 beginning with the words "Clara V. Padgett (white), sworn:" on page 22, at f. 86, down through and including the words: "Q. Personally, you do not know how he got killed, except what you have heard? A. No, sir; nothing at all." on page 24, f. 92.

4. Omit that portion of the printed case for appeal beginning with the words: "Q. What was the condition of Mr. Padgett's health at the time of his death? A. He was in perfect good health." on page 24, f. 92, down through and including the words: "Q. There is not very much money in that, is there? A. No, sir." on page 45, f. 178.

5. Include that portion of the printed case for appeal beginning with the words: "E. N. Chisolm (white), sworn:" on page 45, f. 178, down through and including the words: "Q. You need not state that? A. That is right." on page 92, f. 347.

6. Omit that portion of the printed case for appeal beginning with the words "Rosa Lee Padgett (white), sworn:" on page 93, f. 368,

down through and including the words: "(Attorneys retired for five minutes)" on page 104, at f. 414.

7. Include that portion of the printed case for appeal beginning with the words "Henry Wallace (colored), recalled," on page 104, f. 414, down through and including f. 454, on page 114.

8. Omit that portion of the printed case for appeal beginning with the words: "Mr. Efird: I suppose the first matter to be disposed of * * *" on page 114, at f. 455, down through and including the words, "The Court: That was agreed on yesterday." on page 117, at f. 467.

9. Include the portion of the printed case for appeal, beginning with the words: "W. B. Hooper (white), sworn:" on page 117,
277 f. 467, down through and including the words "98 Seaboard Limited * * * 10:50 P. M." on page 215, at f. 857.

10. Omit that portion of the printed case for appeal beginning with the words "Exhibit 12" on page 215, f. 858, and ending with the words "Judge E. J. C. of Ga." on page 217, at f. 867.

11. Include the remaining portion of the printed case for appeal beginning with the words "Exhibit 13" on page 217 at f. 867, down through and including the typewritten stipulation of counsel following printed page 242.

LYLES & LYLES,
J. B. S. LYLES,
Attorneys for Seaboard Air Line Railway,
Plaintiff in Error.

STATE OF SOUTH CAROLINA,
Richland County:

I, attorney of record, for Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, defendant in error, acknowledge service of the above and foregoing præcipe, and I further stipulate and agree that the transcript, as therein specified to be made up by the Clerk of the Supreme Court of South Carolina, contains all of the record and testimony presented to the Supreme Court of South Carolina that in any wise appertains or relates to the questions to be presented to the Supreme Court of the United States on this writ of error.

W. BOYD EVANS,
Attorney for Clara V. Padgett, Administratrix, etc.,
Defendant in Error.

November 27th, 1914.

278 [Endorsed:] Supreme Court of United States, October Term, 1914. Transcript of Record. Seaboard Air Line Railway, Plaintiff in Error, vs. Clara V. Padgett, Administratrix of the Estate of Lewis H. Padgett, Decea-ed, Defendant in Error. In Error to the Supreme Court of South Carolina. Filed Supreme Court of S. C. 28 Nov., 1914. U. R. Brooks, Clerk.

Endorsed on cover: File No. 24,454. South Carolina Supreme Court. Term No. 710. Seaboard Air Line Railway, plaintiff in error, vs. Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased. Filed November 30th, 1914. File No. 24,454.

Office Supreme Court, U.
FILED
DEC 30 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

W. BOYD EVANS,
Attorney for Defendant in Error.
JAMES H. FANNING,
MELTON & STURKIE,
THURMOND, TIMMERMAN & CALLISON,
W. H. SHARPE,
A. D. MARTIN,
Of Counsel.

The R. L. Bryan Company, Columbia, S. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

Now comes the defendant in error, Clara V. Padgett, administratrix, by her counsel, W. Boyd Evans, appearing in her behalf, and moves the Court to dismiss the writ of error in the above entitled cause, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is mainfest that the writ of error was taken for delay only, and that the questions from which the decision of the cause depends are so frivolous, as not to need further argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the arguments thereon, are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

W. BOYD EVANS,
Attorney for Defendant in Error.

Lyles & Lyles, Attorneys for the Seaboard Air Line Railway, Plaintiff in Error.

Dear Sirs: Please take notice that on Monday, the 4th day of January, A. D. 1915, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for its decision.

Attached hereto, please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

W. BOYD EVANS,
Attorney for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this 9th day of December, A. D. 1914.

. . . . . .

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 710.

SEABOARD AIR LINE RAILWAY, *Plaintiff in Error,*

vs.

CLARA V. PADGETT, *Defendant in Error.*

STATEMENT OF DEFENDANT IN ERROR.

This suit was commenced in the Court of Common Pleas of Lexington county, South Carolina, under the Federal Employers' Liability Act, by Clara V. Padgett, as administratrix of the estate of her husband, Lewis H. Padgett. In this action damages were sought for injuries resulting in the death of the said Lewis H. Padgett, while in the line of his duty as a locomotive engineer.

Upon the trial of the case, and at the conclusion of all of the testimony, the defendant moved for the direction of a verdict in its favor, upon the ground that the entire testimony did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury, and upon the ground that the entire evidence did not admit of the inference that the defendant had been guilty of negligence in the particulars alleged in the complaint, and upon the further ground that the only inference to be drawn from the testimony was that the plaintiff assumed the risks of the dangers and defects causing his death. This motion was overruled by the Circuit Court, and the cause submitted to the jury who returned a verdict in favor of the plaintiff for twenty thousand ($20,000) dollars. Thereupon the defendant duly made a motion for a new trial, upon the

minutes. This was refused. From the judgment entered upon said verdict an appeal was taken to the Supreme Court of the State by the defendant below, who is appellant herein, which Court affirmed the decision of the lower Court. The present writ of error is prosecuted by the defendant below for the purpose of bringing that decision to this Court.

Briefly stated the facts are: That Lewis H. Padgett lived in the city of Savannah, State of Georgia, and had a regular run as passenger engineer between the city of Savannah, Ga., and the city of Columbia, S. C., and that on the 11th day of January, 1913, he left Savannah, Georgia, for the city of Columbia, S. C., about four o'clock in the afternoon, on his regular run, and was to leave Columbia the next morning, January 12th, 1913, about six o'clock, on his regular run back to the city of Savannah, Georgia. That on the night of the 11th January, 1913, when Mr. Padgett reached the station of Cayce, South Carolina, where the Seaboard Air Line Railway was building a roundhouse and terminal, which is located about two miles from the city of Columbia, S. C., Padgett was informed by one of the agents of the said company that when he arrived at Columbia, S. C., to return to the station of Cayce, where the said roundhouse was located, and bring his engine with him, that the company wanted to hold him to take out a special train, which was to leave Columbia about twelve o'clock that night should another engineer in its service not get into Columbia in time to take this train out. Mr. Padgett returned to the roundhouse at Cayce, with his engine, and went into the roundhouse and registered off, and placed a repair slip on a hook by the register, to the effect that the boxes on his engine had run hot and that he wanted them repaired during the night. Later that night he was informed that the other engineer had come in to take out this special trian and that he would take his regular run

back to Savannah the next morning at six o'clock. Mr. Padgett then went to the boarding house at Cayce to retire for the night, but found that it was too late for him to get a room. He then returned to the roundhouse and slept on one of the engines, No. 66, which was in the roundhouse until the next morning about 4:30 o'clock, when the hostler went into the roundhouse for the purpose of taking out the engines to water and coal them before leaving. Mr. Padgett was found by the hostler, Ernest Horsford, on engine No. 66 about 4:30 o'clock on the morning of January 12th, 1913, and Mr. Padgett rode out to the coal chute on engine No. 66 with the hostler, a distance of about seventy-five yards, and asked the hostler where his engine was, as he wanted to see if it had been repaired during the night, before leaving for Savannah in a very short time. The hostler informed Mr. Padgett that his engine was in the roundhouse on track No. 3, whereupon Mr. Padgett left in the direction of the roundhouse and was never seen any more until found in this drop pit, located in the roundhouse, over which his engine was standing. At the time Mr. Padgett left the hostler to go to the roundhouse he had on his overalls and cap, prepared to go out on his run. The call boy that calls the engineers and firemen to go out on their regular runs was then looking for Mr. Padgett to call him in time to take his regular run. The roundhouse at the station of Cayce had not been completed; no lights had been installed in it, and this drop pit, which was more than eight feet deep, had not been covered, and the company had only begun to allow its employees to use the roundhouse on Sunday, January 5th, 1913, just one week before Mr. Padgett was killed, and this was the third trip that Mr. Padgett had made from Savannah since the roundhouse had been in use. The accommodations for the engineers and firemen at this new terminal were very poor, and

it had been customary for the engineers and firemen during the time that they had been running into Cayce, when they could not get accommodations otherwise, to sleep in the houndhouse on the engine.

Findings of Fact by the Supreme Court of South Carolina.

The Supreme Court of South Carolina in examining the record presented to that Court, from the trial Court, found that:

> "There was evidence to show that when the engine came into the yard that night it had a hot box and needed repair. That the rule required the engineer to inspect his engine only about a half hour before the leaving time. There was no intimation that he was forbidden to inspect it before. There was evidence that if the inspection was made at the required hour and it was found that the repairs had not been made or properly made, then the engine would have to be returned to the roundhouse to have the repairs properly made. That the repairs would take time and the time necessary would have to be taken even if it delayed the departure of his train. The evidence is circumstantial, but conclusions may be drawn from circumstances. On the trial appellant took the position that the purpose must be inferred from the circumstances.
>
> "The plaintiff offered to prove Mr. Padgett's declarations, but on appellant's motion, the statements were ruled out because his Honor said the purpose must be inferred from circumstances. In this ruling the appellant acquiesced, and of it there is no complaint. So the question is, are there circumstances from which his purpose can be inferred? It is not altogether fair to try a case on one theory and dismiss it on another.

Mr. Padgett had recently been promoted to a passenger run. Repairs had to be made. He was already awake and dressed a few minutes before he was to be called. He was on the yard with his personal preparations made. He asked where his engine was placed and was told by the hostler in charge that it was on track No. 3 in the roundhouse, and started in that direction. Of course, he had the right, under the rules, to loaf around until the exact minute that the rule required him to take his engine, and if error had occurred in the mechanical department, he had the right to send the engine back and delay the train and say to his superiors, the rule does not require any more and I am not going to do any more than the strict rule requires. Would a faithful servant be likely to do that? That was a question for the jury. Would a man recently promoted stand upon the strict letter of the rule? That was a question for the jury. There is a suggestion that Mr. Padgett went to his engine to sleep. The time at his disposal was short. He did not leave in the office a note as to where he could be found. He went to sleep on an engine that left earlier than he was required to be called. He was found and waked early. The saying, 'the engines belong to the company, but the runs belong to the men,' is much relied upon to show that engines might be changed. The statement, however, is made that while a change could be made, yet the general practice was to allow the use of the same engine. The jury was told of the time that would elapse between the time Mr. Padgett was waked and the time of his regular call. Was it probable that he could use that time in sleep or in inspecting the engine to see that there was no unnecessary delay in doing his work? These were questions for the jury.

> "If they inferred from the circumstances that Mr. Padgett was doing the work that was required of him, not at the time it was required, but at a time when it was not forbidden, then they could conclude that he was engaged in interstate commerce, and under the protection of the Federal statute his Honor could not have directed a verdict on the ground that there was no evidence from which it could be inferred that Mr. Padgett was engaged at the time of his death in interstate commerce."

We submit these findings of fact by the Supreme Court of South Carolina will not be reviewed by this Court.

ARGUMENT.

It becomes manifest from an examination of the assignment of error, in connection with the charge delivered to the jury, that the purpose of this appeal is for delay only.

Nine errors are assigned by the plaintiff in error, who was the defendant below. They are all directed to the affirmance by the State Supreme Court of the judgment of the trial Court, as constituting a denial of a right, privilege and immunity under the Federal Employers' Liability Act.

Upon the presentation of the case to the jury the plaintiff below offered 15 prayers, while the defendant below offered 17, going into the greatest detail on the question of what constituted negligence under this law, the burden of proof and the rights of the defendant, as well as on the question of damages. All of the prayers so offered below were given by the trial Court.

No exceptions were noted at the time of the delivery of the charge, and, as will hereafter appear, the objections thereto were raised for the first time on appeal.

No Federal Question Involved.

There are nine errors assigned on this appeal, none of them clearly raise any Federal question under the Federal Employers' Liability Act. We submit, therefore, that the question involved does not constitute a denial of a right, privilege or immunity under the Constitution. If this raises a Federal question, then every adverse ruling on the introduction of evidence would support the right of appeal to this Court from the highest Court of the State, which we submit is not the law. If this constitutes a reviewable error in this Court, then substantially every question passed upon by the State Court during the cause of a trial under the Act in question would be reviewable here. Every rule and principal governing the law of master and servant decided adversely to the defendant would be the subject of review by this Court, and the hearing by the intermediate State Court would be but an idle ceremony. We submit this is not, and cannot be, the law.

The ninth error assigned clearly rests upon principles of general law. This being true, it does not raise the Federal question, nor is it such a question as is subject to review by this Court on writ of error. It is not sufficient that the case was brought under the Federal statute, but it is the determination of the Federal question that confers jurisdiction. We submit that there was no such question raised.

City of San Francisco v. Scott, 111 U. S., 768, 769.
Chicago and Alton R. Co. v. Ferry Co., 119 U. S., 615, 624.
Bank of the Old Dominion v. McVeigh, 98 U. S., 332.
Rockhold v. Rockhold, 92 U. S., 129.
New York Life Ins. Co. v. Hendren, 92 U. S., 286.

This Court has held that: "The rule in relation to our jurisdiction is, that it must either appear from the record

in express terms that there has been a decision against the right claimed under the Constitution, laws or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding." (Dugger v. Bocock, 104 U. S., 596, 604.) Outside of the simple fact that the suit was brought under the Federal Employers' Liability Act, there is nothing in the record which in express terms shows there has been a decision against any Federal right.

One of the latest decisions of this Court sustaining this view of the case of the Seaboard Air Line Railway v. Duvall, reported in 225 U. S., 477; 56 Law Ed., 1171; and for the convenience of this Court is here quoted in full.

"Seaboard Air Line Railway, *Plaintiff in Error,*

vs.

Ernest N. Duvall.

In error to the Supreme Court of the State of North Carolina.

[June 10, 1912.]

Mr. Justice Lurton delivered the opinion of the Court:

"This was an action by an employee of the plaintiff in error to recover damages for severe and permanent personal injuries alleged to have been received while in its service. The plaintiff alleged that he was baggage-master and flagman on one of the defendant's passenger trains, running from Portsmouth, Virginia, to Monroe, North Carolina. That a head-on collision occurred with another of defendant's train, whereby plaintiff and others were injured, and that the collision was due to the negligence of defendant's officers and agents. The answer was, in substance, a general denial for want of knowledge. There was a jury, verdict and judgment for the defendant in error, which was later

affirmed by the Supreme Court of the State. This writ of error was allowed by the Chief Justice of that Court upon the ground that 'there was drawn into question a right, privilege or immunity claimed by the railroad company under a statute of the United States, and the decision was against such right, privilege or immunity so claimed and specially set up by said defendant,' etc. Such a certificate is, however, not sufficient to confer jurisdiction to review the judgment of a State Court under Section 709, Revised Statutes. That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record, and such a certificate is only of value to make more definite or certain that the Federal right was definitely asserted and decided. Sayward v. Denny, 158 U. S., 180, 183; L. & N. R. Co. v. Smith, 204 U. S., 551.

The Federal question relied upon to sustain the writ of error to this Court concerns the construction and application of the Employers' Liability Act of April 22, 1908, 35 Stat. at Large, 65. Neither the complaint nor the answer makes any direct reference to that Act; but the complaint did allege that the railroad company was operating a line of railroad between Portsmouth, Virginia, and Monroe, North Carolina, and that the plaintiff while in its employment as baggage-master and flagman upon a passenger train running between said points was negligently injured by a head-on collision. This states a ground of action under that Act and it was so assumed by the trial Court, as appears from that part of the charge relating to the effect of contributory negligence, as well as from some of the questions made in the Supreme Court of the State.

That the collision was due to negligence was conceded. The only defense which seems to have been made was that under the rules of the company, the plaintiff was required

to remain in the baggage car; but that he was hurt while in the express car, a place where, it is claimed, his duty did not call him, and, therefore, he was not injured while employed in the service of the company, or engaged in any duty his employment devolved upon him.

The case was submitted upon these issues, and finding of the jury upon each was as follows:

'1. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

'2. Was the plaintiff's injury caused by his contributory negligence? Answer. No.

'3. What damage is the plaintiff entitled to recover? Answer. $30,000.'

Four requests for special charges, which bear upon this defense and which were denied, have been assigned here as error reviewable by this Court. They were as follows:

'1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will find the first issue "No."

'3. That as the plaintiff admits that he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had that notice) required him to remain in the baggage car, when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue "No."

'4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express

car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue "No."

'6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue "No." '

The plaintiff in error also excepted to a part of the Court's charge which was in these words:

'If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation*, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes." If you do not so find, it would be your duty to answer the second issue "No." '

Not one of the requests asks any definite construction of any part of the Employers' Liability Act, or, indeed, contains any reference whatever to the Act

They are based alone upon the admitted facts that at the time of the collision the plaintiff was in the express car, and that there was a rule of the company requiring him to be in the baggage car. They assume that in being in the express car he was where he had no right to be, and that if injured while there the jury must acquit the company of negligence and upon that issue find for the railroad company. The requests take no account of the legal effect of other evidence in the case. Thus, there was evidence tending to show that the express car was used for through baggage, and that baggage was often received from the platform into the express car, and carried to the adjacent baggage car. There was also evidence tending to show that the rule referred to was not enforced, and that the baggage-master and express messenger frequently exchanged work, and that this was known to the conductor, who made no objection. There was also evidence tending to show that both the conductor and the plaintiff had gone to the express car, either upon the call of the messenger or for a social purpose, the plaintiff in either event going by direction or on invitation of his immediate superior, the conductor of the train. Any question as to whether his being in the express car at the moment of the collision either contributed to the collision or to the injury he sustained, as well as any consideration of the question whether he was in any way negligent in being there, as being in a place of greater danger than if in the baggage car, was ignored.

The trial Court was under no obligation to give special charges based upon but a part of the evidence—charges which, in effect, took from the jury every question save the single fact that plaintiff was, when hurt, in the express car, and that there was a rule which required him to remain in the baggage car.

But the plaintiff in error now urges that it was entitled to have construed that provision of the Employers' Liability Act which requires that a plaintiff to recover under it must have been injured 'while he was employed by such carrier in such commerce,' and that the requests denied were applicable to the evidence which tended to show that he had ceased to be such an employee, because he was not, at the moment of the injury, engaged in the conduct of interstate commerce, or at the place where his duty required him to be. That the plaintiff was in the general employment of an interstate railroad, and at the time was the baggage-master of one of its trains running from one State to another, was shown by all the evidence. If his employment had been terminated, it was solely because he had momentarily gone into the adjacent express car. If he was injured while employed about something which it was not his duty to do, it was solely due to the fact that he had gone into that car either under direction or with the consent of his conductor.

This case does not come here from a Federal Court and we are, therefore, not a Court of general review. It comes under Section 709, Rev. Stat., and the power to review a judgment of a State Court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, 'when any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute * * * and the decision is against the title, right, privilege or immunity specially set up or claimed, * * * may be re-examined or reviewed.' * * *

This action was brought under an Act of Congress. If the Act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled, was denied, a right has been denied

under the statute, and the question may be reviewed by this Court. In St. L. etc. Ry. v. Taylor, 210 U. S., 281, 293, it was said:

> 'Where a party to litigation in a State Court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States, which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest Court of the State, then the question thus raised may be reviewed in this Court. The plain reason is that in all such cases he has claimed in the State Court a right or immunity under a law of the United States, and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.'

That case came from a State Court from a judgment against the plaintiff in error in an action under the Safety Appliance Act. But in that case the Federal question was specially set up and definite rulings had upon definite questions requiring a construction of the Act. Thus the Court concludes the paragraph above set out by saying:

> 'The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the Act, which warranted on the evidence a judgment in its

> favor. The denials of its claims were decisions of Federal questions reviewable here.'

It was the obvious duty of counsel, if they wished any particular construction of the Act, to put the request in such definite terms as that the attention of the Court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the Court. 'It must appear on the face of the record that it was in fact raised; that the judicial mind of the Court was exercised upon it; and then a decision against the right claimed under it.' Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the Act, so directly involved that the Court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. Maxwell v. Newbold, 18 How., 515; Sayward v. Denny, 158 U. S., 180; Gillis v. Stinchfield, 159 U. S., 658; Speed v. McCarthy, 181 U. S., 299, 275, 276; Gaar, Scott Co. v. Shannon, decided at present term. In Appleby v. Buffalo, 221 U. S., 524, 529, this Court said:

> 'This Court has had frequent occasion to say that its right to review the judgment of the highest Court of a State is specifically limited by the provisions of Section 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the State Court. In such cases it is thoroughly well settled that the record of the State Court must disclose that the right so set up and claimed was expressly

> denied, or that such was the necessary effect, in law, of the judgment. Sayward v. Denny, 158 U. S., 180, 183; Harding v. Illinois, 196 U. S., 78; Waters-Pierce Oil Co. v. Texas, 212 U. S., 86, 97.'

Passing now to the error assigned to a paragraph in the general charge, the part objected to and assigned as error is the clause italicized. It was a part of the general charge in respect of contributory negligence. It was limited to the separate issue submitted to the jury as to such negligence.

It is not easy to see why the mere going into the express car would be negligent unless the conditions were such as to be an act of imprudence which a reasonable man would not have done. But this we pass by as pertaining to the merits. In any event the exception did not raise any specific question as to the proper construction of the Act under which this action had been brought.

The jury was in explicit terms told that if they found the plaintiff guilty of contributory negligence it would not bar a recovery, but that the damages assessed must be diminished in proportion to the amount of negligence attributable to the plaintiff. This was in pursuance of the statute. The jury specially found that the plaintiff had not been guilty of contributory negligence.

In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this Court may review. The motion to dismiss the writ for want of jurisdiction is therefore granted."

This Court Without Jurisdiction.

We submit that this Court is clearly without jurisdiction to review the findings of fact of the two lower Courts.

In Dower v. Richards, 151 U. S., 658, 38 Law. Ed., 305, the Court held:

"To review the decision of the State Court upon the question of fact is not within the jurisdiction of this Court.

A writ of error brings up matter of law only.

Upon a writ of error, this Court cannot review a decision of a question of fact, even where, by the local practice of the State, the law and the facts are tried together by the Judge without a jury.

A writ of error to review a judgment or decree of a State Court can be sustained only when the decision of the State Court is against a right claimed under the Constitution and laws of the United States.

When the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this Court.

This Court, in an action at law, at least, has no jurisdiction to review the decision of the highest Court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided."

This Court held in Minneapolis & St. L. R. R. Co. v. Minnesota Railroad & W. Com., 193 U. S., 48 Law Ed. 619:

"The finding, like the verdict of a jury, is conclusive in this Court. Dower v. Richards, 151 U. S. 658, 38 Law Ed. 305, 14 Sup. Ct. Rep. 452."

It also held in Adams v. Church, 193 U. S., 48 Law Ed. 770:

"The finding of facts made in the Supreme Court of Oregon is binding upon this Court and will be the basis of decision here. Egan v. Hart, 165 U. S. 188, 41

L. Ed. 680, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452."

Also in Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 48, Law Ed. 948, the Court said:

> "It is the settled rule that this Court in an action of law, at least, has no jurisdiction to review the conclusions of the highest Court of a State upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co., 92 U. S. 315, 23 Law Ed. 515; Dower v. Richards, 151 U. S. 658, 38 Law Ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 Law Ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41 Law Ed. 472, 17 Sup. Ct. Rep., 110; Hedrick v. Atchinson, T. & S. F. R. Co., 167 U. S. 673, 677, 42 Law Ed. 320, 321, 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 Law Ed. 392, 394, 18 Sup Ct. Rep. 38; Egan v. Hart, 165 U. S. 188, 41 Law Ed. 680, 17 Sup. Ct. Rep. 300.

When Can an Employee Be Said to Be Employed in Interstate Commerce Within the Term of the Act.

As it was said by Mr. Justice Van Deventer in delivering the opinion of the Court in Pedersen v. Delaware, L. & W. R. Co., 229 U. S., 57 Law Ed. 1128:

> "The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done, some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the material be at hand, and the act of

taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See Lamphere v. Oregon R. & Nav. Company, L. R. A. (N. S.) 116, C. C. A. 156, 196, Fed. 336; Horton v. Oregon-Washington R. & Nav. Co., 72 Washington 503, 130 Pac. 897; Johnson v. Southern P. Co., 196 U. S. 1, 21, 49 Law Ed. 363, 371, 25 Sup. Ct. Rep. 158."

So it was with Mr. Padgett in going to the roundhouse to see if his engine had been properly repaired before it was taken out of the roundhouse to be coupled to his train to go to Savannah.

In conclusion, it is submitted that the issues have been fairly submitted to the jury upon seventeen prayers offered by the defendant below, touching upon every conceivable proposition of the law of negligence relating to a case of this character, every one of which was given by the Court without qualification, the judgment should be affirmed since no prejudicial error is assigned.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Defendant in Error on the Merits.

W. BOYD EVANS,
Attorney for Defendant in Error.

STATEMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

A motion to dismiss or affirm was made before the Court, and was presented on printed briefs in behalf of the motion and against the motion. The Court disposed of the motion by placing the case upon the Summary Docket for a hearing.

The defendant in error relies, for its statement of the case, upon what is presented in its argument in support of its motion to dismiss, above referred to. The argument which it desires

to submit, and have made in addition thereto, presents such additional points of fact not heretofore called to the attention of the Court.

ARGUMENT.

It is undisputed that the intestate, Padgett, was employed in interstate commerce; and, as such, had been for a few days, running an engine, drawing a passenger train, from the city of Savannah, in Georgia, to the city of Columbia, in South Carolina, and between the said city of Columbia and the said city of Savannah.

It is also undisputed that the trains that he had run were numbered, when proceeding from Savannah to Columbia, as No. 62, and returning from Columbia to Savannah, as No. 59. The number of the engine that he had heretofore used, to wit, in the two prior trips, was No. 35.

It does not appear in the testimony that the intestate had personal knowledge of the existence of drop-pits on any particular track in the roundhouse. If such knowledge existed, it is only imputable by inference. It is further to be especially noted that the trains to which he was assigned, Nos. 62 and 59, were, as to their times of arrivals at Savannah and at Cayce, stated in Central time, and not in Eastern time. This time—the difference between Eastern and Central time, being one hour in advance of Central time. It is found, however, that upon the time table in evidence, at page 137 of the record, that the train times are fixed from leaving Cayce and arriving at Cayce, from leaving Savannah and arriving at Savannah was on Central time; but it is to be especially observed that Cayce was a mere local station, near the new machine shops or yards of the Seaboard Air Line Railway; that the engine drawing a train from Savannah had to pass through Cayce, to Columbia, and then to return from Columbia to Cayce—a distince of something over two miles; and the engine drawing the train from Cayce, would have first to go from that point to Columbia, and thence back to Cayce. So, in the operation of trains under consideration, you have to consider the time lost or taken up, or consumed, by the train going to Columbia and returning.

The locomotive driven by the intestate was, however, to haul said train further to Columbia, there to separate from the train and return to Cayce. How much time was taken up in

this movement from Cayce to Columbia and return, is not stated.

It is undisputed that the engine drawing train 62, driven by the intestate, was brought back from Columbia to Cayce, placed at the proper point on one of the side-lines, and the hostler took charge thereof. The intestate thereafter, reported that there was a hot-box which needed repair.

Stopping here for a moment and observing that the defendant in error's intestate was in the employ of the railroad company from the time he was awakened at 4:30 a. m., Central time, or 5:30 Eastern time, and inquired as to the location of his engine, to the time the accident occurred, which resulted in his death, must have been

(*a*) Engaged in interstate commerce, in the employment of a railroad company, engaged in such commerce, in the preparation of and in the hauling of said passenger train, or

(*b*) Engaged in intrastate commerce, or

(*c*) Engaged in his own business and affairs, which was wholly unconnected with either of the two preceding.

That he could not have been engaged in "b" is perfectly manifest. This reduces the proposition down to what the defendant presents as its chief defense in the answer: That on the night and at the time the intestate passenger engineer came to his death, he was not doing any duty for the defendant or otherwise, but on the contrary he was a trespasser, without permission, or license of the defendant, in going into the roundhouse where he well knew and should have known, was in darkness and dangerous pits, into which he might fall, and in failing to look out for said pit or pits, and protect himself from falling therein. Was he upon his own business, unconnected with the movement of his engine and train? Whether he was upon his own business, unconnected with his employment, was the principal and vital issue of fact presented to the Court for the decision of the jury below. It was also the principal point urged before and determined by the State Supreme Court; and it is the principal point now presented to this Court: That is to say, it is contended that his actions were disconnected from his employment as an engineer engaged by the railroad company in the conduct of its interstate passenger transportation, or whether he was simply acting without any respect, regard or duty in the premises, or in the discharge of any right or

any obligation to the railroad company whatever in the interstate running of his engine, drawing No. 59 train. It is respectfully submitted that the issues, therefore, cannot be mistaken or evaded. It is, first, however, to be considered whether there was any negligence at all upon the part of the railway company towards the intestate; for, if there was no negligence whatever, then the company, under no law, statutory or common, could be held liable for his death, for there is no statute in South Carolina of common law existing and no statute of Congress making a railroad company an insurer or liable for accident to its employees unless coming within the terms of the Employers' Liability Act.

Having thus narrowed down the issue, whether there was any negligence upon the part of the railroad company, and whether such negligence comes within the terms of the Federal Liability Act, the plaintiff in error is compelled, at the outset, under this record, to show that there was no negligence upon the part of the company, which should have been submitted to the jury in the Court below, and to show that there was no casual connection between such negligence and the death of the intestate.

It is admitted, and stands without dispute, that the railroad company had removed the making up of its trains, or the preparation of its engines, for the hauling of its southbound and northbound trains from Columbia, its old terminal, to Cayce. It is admitted that for this purpose that for sometime the railroad company had in the course of construction a roundhouse with all of its necessary arrangements for watering and coaling its engines, and for the repair of same. (We do not, in this case, have anything to do with the train itself.) It is perfectly evident from the testimony that the railroad company was hastening the use of such roundhouse for such purposes, and that it was inadequately prepared at Cayce to do the very work which had heretofore been done at Columbia; and in some respects some of the work was done at Columbia, while some, at the same time, was done at Cayce.

However long may have been the employment of the intestate in the service of the railroad company as a freight engineer, it is perfectly obvious from the testimony that he could not have known and did not know of the conditions existing in the roundhouse, for the use of such roundhouse had only

commenced about one week before his death, and that he had become a locomotive engineer drawing a passenger train for a period which allowed him only two runs. The run that he was to take would have made his third run—without the knowledge, therefore, of the exact situation. It is also undisputed, notwithstanding the statements contained in counsel's brief, that the accommodations at Cayce were not adequate for the performance of the duties of and the use of the employees of the company. So that we have at once a case of a roundhouse, repair shop, coaling and watering arrangements not fully completed, nor adequate, and their condition not known or which could have been known to the intestate.

We next observe the fact that the engineer in bringing his train past Cayce carried it into Columbia, brought it back to Cayce at 10:50, Eastern time; that he there found he had a hot box on his engine, and before it could be used in the morning it would have to be remedied.

On his arrival at Cayce, from Columbia, he was advised that the engineer had turned up to carry the train, No. 43, that was stated to him he might be called upon to carry out, he registered off, then he stayed around there until he was informed, somewhere about midnight, that the other man would go on his regular run; therefore, that would leave him to go on his regular run. He then went up to the boarding house to get a room to go to bed, but found it filled up. Then he went back down to the roundhouse, got on engine No. 66, which the hostler was to take out next morning ten or fifteen minutes before his engine was to go out.

The question immediately arose in his mind, where should he go? He had to be called to take his regular train out with his regular engine, his train being No. 59 and his engine being No. 35. So as to be sure that he would not miss his train, or to have any mishap in going out with it, he went into the roundhouse and went to engine No. 66, knowing that that engine had to go out just before his engine, No. 35. This would give him an assured place of being awakened so as to carry his engine to Columbia, and there haul back, through Cayce, to Savannah, train No. 59. He went into the roundhouse, having no other place to go, and further knowing that if he did go to some other place the call boy, or those whose duty it was to awaken him, could not find him.

He, therefore, went upon engine No. 66, went to sleep, and just as he had arranged it, engine No. 66 was carried out at 4:30 o'clock Central time or 5:30 Eastern time, to the coal chute to be coaled and watered; he was there awakened by one of the hostlers, Horsford, and he then asked as to the whereabouts of his own engine, ascertaining, it must be presumed, what time it was.

The time when the repair should be made upon the hot box by the foreman of the roundhouse, or under his direction, is not fixed in the record, but it would be done between the time it was turned over to the hostler and the time it was to go out, or the time he was to be notified he was to go out. Being uncertain whether this had been done or not, and as the time, upon calculation will show, he went back to ascertain whether the hot box had been fixed. He was told by the hostler that it was on track No. 3. He started toward it and was not seen again until discovered dead in the drop-pit.

Hostler Horsford says (Record, page 44) that it was a part of his duty, so as to prevent any delay in taking his engine to Columbia to attach to train No. 59 that he (Padgett) should inspect his engine to see that proper repairs had been made. If he had waited until engine was brought out, coaled and watered he would have to have it carried back to the roundhouse and repaired, and within the thirty minutes claimed to be the only time that he was allowed, it could not be done, and he could not have reached Columbia in time to haul out No. 59.

It does not appear to have been the hostler's duty to see that the hot box was cleaned out and repaired. That was a matter for the roundhouse people. It was not the duty of the hostler, after the engineer had turned his engine over to him, to do more than to carry the engine into the roundhouse for repairs, and at the proper time, being prior to the time designated for the run, to carry it out, coal it and water it for the trip. It, however, was the engineer's duty of calling attention to the hot box when registering off.

When the intestate asked where his engine was, that he was to take out, we contend, that it was the duty or the right of the engineer, in order to make the run and make his proper connections, to ascertain whether the hot box had been properly packed. He, himself, was in the actual per-

formance of his duty, irrespective of the time when a call boy brings it to his attention, because he was then awakened. There was, therefore, no necessity of waiting for a call boy, but his duty to ascertain whether his engine was in a condition to be coaled and watered and carried over to Columbia.

It is certainly purely imaginary that this engineer went to his engine for the purpose of going to sleep. He had already rested for four hours in the cab of engine No. 66. He had previously reported that his engine needed repair, or fixing, in the particular mentioned. He knew that if the engine had been brought out by the hostler to the coal chute without such repair that it would have to be taken back to the roundhouse, causing necessary delay in reaching Columbia in time to haul train 59 upon schedule. He had no purpose in asking where his engine was located in the roundhouse, if there was any fixed place for him to take it from one of the side tracks where the hostler would place it. The inquiry was perfectly useless unless we attribute to him the purpose of ascertaining for himself whether such hot box had been fixed and the engine was in shape to make the run. The next engine to be taken out after No. 66 was his engine, No. 35. There was no cause for him to go to sleep. On the contrary, he considered himself in a position not to require the warning of the call boy, but to perform one of his duties of inspecting his engine before it left on its run. This he would have to do, even after the hostler had carried it out of the roundhouse to the coal chute and then upon the track to go to Columbia before he commenced his run. Hence, he was in the performance of one of his duties of looking after his engine to see that it was in a running condition. His action, we submit, was in advancing the interest of the company, and in one of the necessary performance of seeing that the engine was in proper state. The purpose for which he inquired about his engine and the object he had in view in proceeding to it, in view of all the surrounding circumstances, was a question of fact for the jury to determine. It is respectfully submitted that if he went there for the purpose of inspecting his engine, and with the idea of riding back on it with the hostler to the point of departure for Columbia, that he did so in the performance of one of the necessary things to be done in the final preparation to starting said engine on its way to engage in

the interstate transportation of train 59, running between Columbia and Savannah. That it was not beyond his duty or the practice or custom of engineers to do this we think is established by the testimony in the case.

BEARING OF THE RULES OF THE COMPANY UPON THE CASE.

The plaintiff in error introduced certain rules of the company with regard to the duties of engineers in relation to their engines. These rules will be found in the Record at page 136, and he cites rules Nos. 21, 23, 24 and 27, to which may be added rule 22 on page 110, which is not noticed by plaintiff in error. It contends that under these rules there was not only no duty, but no right of the engineer to look after, take care of, or give any attention, to his engine which he was accustomed to run; that is to say, it is the contention of the railroad company that as soon as an engineer, after bringing his engine (in this particular instance from Columbia back to Cayce), and the roundhouse, he had simply to notify and turn over his engine to a hostler and to report any defects in the engine at the registering office; that he was thereafter under no obligation, no right and by habit and custom recognized by the company could not enquire after, take care of, or direct his engine, until thirty minutes in advance of the leaving time of the train for which he was called to take care of. The testimony in the case, we respectfully submit, does not sustain this contention.

Rule 21, Record, page 136, obviously has no bearing upon the duty, right or obligation of the intestate engineer in this case upon this occasion.

Rule 22, Record, page 136, manifestly shows a diversity of time applicable to certain points and cannot be construed as not permitting an engineer to wake of his own accord and to look after his duties so far as he sees fit. It only binds the company that he shall receive timely notice before he shall be called to enter upon his duties. It cannot, therefore, in this instance, in any way be construed, if there be no other objection or reason contrary, as precluding the intestate engineer from being awake and attending upon his customary duties prescribed by the rules, by the practice and by the acquiescence of the railroad company. Rules may be waived by the company. Not only is this true from a construction of the rules,

but so from the evidence given in the case. Rule 22 (Record, p. 110) prescribes that the engineers will have to be called one hour and fifteen minutes before leaving time of train. The deceased was entitled to be called within this time.

The witness, Horsford, the hostler (Record, p. 44), was asked the questions:

"Q. State whether or not it was the engineer's duty to see that it was properly done before he took the engine out? A. He had to see before he left, before he went out.

Q. He had to see before he went out? A. Yes, sir.

Q. If he had to wait and inspect it down there at the coal chute, and it had not been done, he would have had to take it back to the roundhouse, and the train been delayed, and there would be delay in working the engine over? A. Yes, sir.

Q. That is correct, it is not? A. Yes, sir."

It will thus be observed that it was not the hostler's duty, as heretofore pointed out, to look after the repairs, but that attention had to be given by the engineer to his engine, even after he had turned the same over to the hostler and before he actually took charge of the same to commence his run with the engine back to Columbia, and from Columbia back through Cayce to Savannah.

It will thus be seen that the contention of the plaintiff in error cannot be sustained; that there was no duty under rule 22 for the engineer to look further after his engine until the same was placed upon the track for the purpose of moving it to Columbia.

Rule 23, Record, page 136:

> "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called."

This does not conflict with the testimony of the hostler or with the conclusion reached with regard to rule 22.

It will further be noticed that under rule 23 the place at which engineer shall take charge of his engine is not designated by rule nor could it otherwise arise than by practice, which may be varied and changed off and on,—that is to say, entirely dependent upon the practice recognized and engaged in by the engineers and those having direction of dispatching of engines.

Rule 24, Record, page 136, apparently can have no application in this case.

Rule 27, Record, page 136, is as follows:

> "27. Engineers will not be held responsible for engines after being relieved from duty."

When they are relieved from duty depends upon the practice and regulation in force at the time and the place. Whether the engineer is relieved absolutely from all care of his engine after it has been turned over to the hostler depends upon the fact and the testimony in the case.

We find first that such engineer, notwithstanding his engine is placed at a certain point, and taken charge of by the hostler, he still has to examine and inspect his engine and thereafter make a report thereon,—shows that his duty with regard to his engine is not suspended as soon as it is turned over to the hostler.

And, further, it appears from the evidence that a further duty rests upon him to see, before the engine was carried to the coal chute and water tank, for coaling and watering (see Record, page 44), that the engineer must be satisfied that the repairs requested by him, have been made, and to see to it that his directions to haul a certain train, to which he is assigned, shall be punctually carried out, as to cause no delay.

We thus find, from examination of these rules, which, while they may be construed by the Court, must be taken in connection with the actual practice and the customary handling of trains, recognized and acquiesced in by the company, they cannot, in the sense of being absolutely disposed of by the Court as a rule of law, but must be in connection with all the facts and circumstances of the case, be submitted to the jury to determine the true state and applicability thereto.

It must, therefore, be submitted that any contention that a passenger engineer of the Seabroard Air Line Railway, an interstate railroad company, engaged in running on a regular run of certain specified trains between Savannah and Columbia, has no duty in connection with his engine whatsoever before thirty minutes in advance of the leaving time of the train for which he is called.

In this case, the deceased engineer, under rules, had to be called one hour and fifteen minutes, and under rule 23, he was

required to take charge of his engine thirty minutes in advance of the leaving time of the train for which he is called. To carry out these rules, it would be necessary, in case the repairs were not made, for him, thirty minutes before train time, to take back the engine into the roundhouse, have it repaired or fixed, then run it two miles to Columbia, across the Congaree River, and there make connection with the train, No. 59, and bring it back to Cayce at schedule time.

The intestate, on account of the inadequate and defective arrangements of the plaintiff in error's yard and shops at Cayce, and the manner in which the operations of the company were conducted constituted serious derangement of its own rules as well as creating dangers to which its engineers and other employees were exposed, and which are charged in the complaint.

It, therefore, necessarily follows, as we respectfully submit, that defendant in error, intestate, cannot be chargeable with negligence himself, or with the assumption of any risk arising from this condition of affairs except what was brought to his knowledge or what could have been reasonably ascertained. No evidence in the case tends to show that he ever had any knowledge of these drop pits, or that the engine stood over them in such a way as to make it dangerous in approaching or attempting to get upon engines in the roundhouse.

Further, his action in awaiting until sometime after twelve o'clock at night to ascertain whether he was to take out some other engine in the roundhouse, and go to Columbia, across the Congaree River, couple up with train 43, known as the Limited Train, and to carry the same on to Savannah, was fully justified and was made at the direction of his superior officers. When, however, at the time he was advised that the regular engineer would be able to take his own run and carry train 43, he was in the exercise of full care in attempting to seek an opportunity for rest and sleep at the place provided for by the defendant railroad company, there being no other accommodation and no other sleeping place at Cayce. This being true, an act of omission upon the part of the railroad company to provide sufficient accommodations for its operatives, under the abnormal conditions that arose at this particular place, and at their own risk, to accelerate their business, so under these rules, knowing that he had to take out his own engine, if repaired,

and in condition, and to take up his regular run; that is to say, to carry train No. 59, from Columbia to Savannah, he sought the best course to pursue, knowing that he could be called within any time necessary to get hold of his engine and carry it to Columbia and attach it to train 59, and carry it thence to Savannah. And instead of lying upon the ground near the track, or at any other point where he might be in danger, he went to engine 66, which he knew would be attached to some train which would leave the roundhouse and thus necessarily awaken him from his sleep in time to take charge of his engine and carry it over to Columbia and bring back train No. 59.

A calculation and close inspection of the time, bearing in view the difference between Eastern and Central Time, will show that he had only a short time to perform this duty.

The testimony shows that while it was not customary, because the roundhouse, and the use of the roundhouse had not been commenced more than a week before his death, yet within that time employees had been allowed, with the knowledge of the company, on account of the inadequate facilities, to sleep in the cabs of the different engines in the roundhouse. (See Record, page 49.)

He took this course according to his expectation, as hereinbefore set out. When the hostler came to take charge of engine 66 and carry it out to the coal chute and water tank, to coal and water the engine, he found the engineer, intestate, asleep in the cab of engine No. 66. He woke him up and carried him to the chute, a short distance; there stopped his engine; the intestate, Padgett, instead of getting off and claiming that he had no right to look after his engine, or to pay any attention to it until thirty minutes in advance of the time of taking his engine into Columbia, inquired, "Where is my engine?" He was informed that his engine was on track No. 3. He went to find his engine for the deliberate purpose (as we contend) of seeing if the hot box had been packed during the night, and would be ready, after being properly coaled and watered, to carry train No. 59 to Savannah. He was seen going directly towards his engine in the roundhouse. Shortly thereafter, the hostler came, took charge of the engine, carried it to the coal chute, coaled and watered it, and placed it upon the track to be carried to Columbia. Engineer Padgett was not on hand. Delay could not be made, so prompt must be the

action, and so short a time was allowed to the engine to proceed to Columbia, across the Congaree River, to the terminal in Columbia, where train No. 59 stopped, ready to be connected with the engine, to haul the train southward to Savannah. Shortly thereafter the body of the missing engineer was found in the drop pit. When an engine or train stood over the same it was partially out of sight.

And, in the language of counsel, "Unguarded, open and unlighted." Irresistibly there can be but one conclusion: In going to his engine to inspect and examine it with regard to whether it was in condition to go out, so that no delay would be caused, or ascending its steps, not knowing of its dangers, alleged in the complaint, went to his death.

We submit, therefore, under any construction of any of these rules that they cannot bear out or sustain the contention of the plaintiff in error, but that the finding of fact of the jury, which in the light of all the circumstances, which show more brightly and clearly in the Court room, than can in a Court of appeals or of review, found, as a fact, that his death arose as alleged in the complaint; the cause of it was the unguarded and unlighted drop pit in the track.

The principles heretofore determined by this Court have been so explicitly set forth that it does not warrant us in doing more than refer to them generally.

In the case of *North Carolina Railroad Company* v. *Zachary*, 232 U. S., pages 248, 260, it was argued and claimed that, "So far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of the interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson* v. *Del., Lack. & Western R. Co.*, 229 U. S., 146, 151; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S., 156, 161."

In that case it appeared that the deceased had left his engine and was going to his boarding house, engaged upon a personal errand and not upon the carrier's business. "Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just

prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co.* v. *United States,* 231 U. S. 112, 119."

"We conclude that with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider."

The Supreme Court of the State of South Carolina decided that a railway employee while engaged in relaying rail on a line of railroad is also within the Federal Employers' Liability Act while asleep at night in a shanty car of a train on a side-track, placed there for accommodation of such employee. *Sanders* v. *Charleston etc. Ry. Co.,* 97 S. C., page 50.

Considering all of the testimony and the reasonable inference to be drawn therefrom, it is submitted that no case can be cited which would deprive the jury in the State Court trying the issue of fact, whether the party complaining was an employee of an interstate carrier was injured at the time he was employed by the company in such interstate commerce. This necessarily follows because of concurrent jurisdiction of the State Court to entertain such case and to try them according to the procedure and evidence prevailing in the State Court and of the jurisdiction exercised by them. It may be thoroughly conceded that under the case of *St. L. & Iron Mt. Ry.* v. *McQuerter,* 229 U. S., 265, that if there is no legal evidence tending to show that the complainant was so engaged at the time of his injury, that this Court, notwithstanding the decision of the trial Court, and of its affirmance by the appeal Court of the State, in the exercise of its jurisdiction over this Federal Statute would reverse the decisions below; yet, in all of such cases, both the State Supreme Court, as a Court of error, and this Court, as a Court of error, will not reverse the finding of the trial jury under proper instruction, and when the Supreme Court of the State has affirmed such finding of fact, if there be evidence in the record to support the finding of fact that the party complainant was engaged at the time of

injury in interstate commerce, will not set aside the finding of fact of a jury, or of an inferior Court in cases of law.

"APPEAL REVIEW OF VERDICT.—A verdict in favor of plaintiff in an action for death should not be set aside by an Appellate Court for the lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which can properly be taken of them."

Meyers v. *Pittsburg Coal Co.*, 233 U. S., p. 184, 58 Law Ed., p. 907.

"The evidence upon the merits of the case, though obscure, and meager as to the circumstances of the accident, was such as to justify its submission to the jury."

American Railroad Co. of Porto Rico v. *Federico Didricksen*, 227 U. S., p. 145, 57 Law Ed., pp. 456, 457.

"Employees, though inactive, are none the less on duty within the meaning of the Hours of Service Act of March 4th, 1907, penalizing carriers for keeping their employees on duty more than sixteen consecutive hours, where they are under orders, liable to be called upon at any moment and not at liberty to go away.

Missouri, Kansas & Texas Railroad Co., of Texas, and *American Surety Co., of New York,* v. *U. S.*, p. 112, U. S., Vol. 231, 58 Law Ed., p. 144.

W. BOYD EVANS,
Attorney for Defendant in Error.

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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error, Opposing Motion to Dismiss or Affirm.

J. B. & LYLES,
Attorney for Plaintiff in Error.

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J. B. S. LYLES,
Attorney for Plaintiff in Error.

STATEMENT FOR PLAINTIFF IN ERROR.

The statement of defendant in error is so misleading in essential particulars that it is deemed necessary to present to the Court a complete statement of the case.

The writ of error brings up a judgment of the Supreme Court of South Carolina, filed November 18th, 1914, affirming a judgment of the Court of Common Pleas for Lexington County, South Carolina, in the sum of $20,000 and costs entered on a verdict in favor of plaintiff below.

The suit was a civil action commenced on June 20th, 1913, by the plaintiff, Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, for the benefit of herself and eight dependent children, against Seaboard Air Line Railway, defendant, under the Federal Employers' Liability Act of Congress, to recover damages for the death of said intestate, alleged to have been caused by the negligence and wrongful acts of the defendant on January 12th, 1913, while said intestate was employed by defendant as a locomotive engineer in interstate service.

The references made are to the printed transcript of record.

ISSUES RAISED BY PLEADINGS.

The complaint alleged that the defendant was an interstate carrier engaged in the conduct of a general railroad business in and through the States of Virginia, North Carolina, South Carolina and Georgia, and that it owned and controlled a railroad yard composed of several tracks, roundhouse and other appurtenances at Cayce, in Lexington County, South Carolina (Complaint, paragraphs 2 and 3, R. p. 2). This was admitted by the answer (Answer, paragraphs 2 and 3, R. p. 5). The complaint further alleged that at the time of his death, plaintiff's intestate was discharging his duties as an interstate employee and was in the service of the defendant as a locomotive engineer, running between the city of Savannah, Georgia, and Cayce, Lexington County, South Carolina, and that on the night of his death, the said intestate, in the discharge of his duties as such locomotive engineer in interstate service, went into the roundhouse of the defendant in its Cayce yards and there met instant death by falling into a drop pit. (Complaint, paragraphs 3-7, R. pp.2, 3.)

The answer admitted the death of intestate, but denied the allegations of fact to the effect that he was in the service of the defendant or discharging any duties incident to his employment when he went into the roundhouse and fell into the pit. (Answer, paragraphs 3-7, R., p. 5.) The answer

further set up as a second defense that intestate did not go into the roundhouse in the performance of any duties as engineer for defendant, but, on the contrary, without even permission or license of defendant, and as a trespasser. (Second defense, R. pp. 5-6.)

The complaint further alleged that the death of intestate was caused by the negligence of the defendant, its officers, agents and employees, in allowing the roundhouse at Cayce to be used before completed and while in an unsafe and dangerous condition, and directing and permitting intestate to go to his engine, which was in the roundhouse standing over an open and unprotected pit, in the nighttime, with no lights or other protection therein, and further in not relieving intestate from duty on the night he was killed, but on the other hand, holding him on duty and in suspense during the night. (Complaint, paragraphs 8, 9, R. pp. 3, 4.) The answer denied these allegations of negligence (Answer, paragraphs 8 and 9, p. 5). The answer further set up, as a third defense, contributory negligence on the part of intestate, and as a fourth defense, assumption of risks on the part of intestate (R., p. 6). The complaint specifically alleged that the action was brought under an Act of Congress, passed April 22, 1908, and amendments thereto, known as the Federal Employers' Liability Act (Complaint, paragraph 5, p. 3).

STATEMENT OF EVIDENCE.

The statement of the evidence given in the statement of defendant in error is entirely misleading in certain essential particulars, and as an understanding of the undisputed testimony, together with all reasonable inferences to be drawn therefrom, will, in our opinion, largely conclude the questions now before the Court, we undertake to give such a statement as follows:

The roundhouse of defendant in its Cayce yards was built to house engines temporarily, and was put into service on January 5th, 1913, just one week before intestate's death. The roundhouse is semicircular in shape and

contains ten tracks, which converge at its entrance so as to allow engines to be run into it upon any one of these tracks, from a single track turntable, located immediately in front of the roundhouse, to the south, in which direction the roundhouse opens. Between and under the rails of each of these tracks is a pit some four feet in depth, running the entire length of each track in the roundhouse, so that machinists can go underneath the engines on such tracks for the purpose of repairing them. In addition to the pits beneath and under each of these tracks, there is another pit some seven feet in width and ten feet ten inches in depth, which runs between tracks two and three, at right angles to them. This is a drop pit, so-called because used for the purpose of dropping driving wheels off of an engine on one of these tracks and transferring the wheels to the other track upon which they are taken out. This is the pit in which intestate was found dead on the morning of January 12th, 1913. (Witness Cline, pp. 7-8; Chisolm, pp. 17-18; Garrett, pp. 55-56, 58-60, 65-66.)

Plaintiff contended that the roundhouse was incomplete because the drop pit had not been covered and no lights had been installed in the roundhouse. Defendant contended that the roundhouse was complete. There is no evidence in the record that the pit was subsequently covered or lights subsequently installed in the roundhouse. The trial Judge overruled the efforts of plaintiff's attorneys to introduce such evidence. (Cline, p. 9; Chisolm, p. 18; Horsford, p. 48; Hooper, p. 65; Garrett, pp. 66-71.)

The evidence was undisputed that no lights were installed in the roundhouse and the pit was uncovered at the time of intestate's death. (Cline, pp. 8, 14-15; Wallace, p. 25; Riggs, p. 30; Horsford, p. 48; Hooper, pp. 64-65.) The evidence was, however, that the roundhouse and pit were completed according to specifications. (Garrett, pp. 66-71.)

Intestate had been in the service of defendant as a freight engineer for a number of years. He had been pro-

moted to his passenger run on the same day that the roundhouse was put in service. His run was local passenger No. 59, from Cayce to Savannah, scheduled to leave Cayce at 6:10 a. m., Central time, and the corresponding train, No. 62, from Savannah to Cayce, scheduled to arrive at Cayce at 8:50 p. m., Central time. He went down one day and back the next. He had made three trips into the Cayce yards on this run since the roundhouse had been in use, and had, of course, made numerous trips as a freight engineer during the construction of the roundhouse. On the day in question he left his home in Savannah at 3 p. m.

Under the agreement between the engineers, including the plaintiff, and the defendant company, effective at the time of intestate's death, and containing the rules and regulations specifying the duties and work of engineers, hostlers and machinists were provided at the Cayce yards to take entire charge of engines brought into the Cayce yards by engineers, and make such engines ready to go out upon their runs (Rule 24, R. p. 136). The Cayce yards were a part of the Columbia terminals (two miles distant) and this rule applied there (R. p. 80). Rule 27 provided: "27. Engineers will not be held responsible for engine after being relieved from duty." Rule 23 provided: "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called." (R. p. 136.) In construing these rules, the trial Judge very properly charged the defendant's requests 18, 19 and 20, as follows:

"18. Under Rule 21 of the contract between the engineers and the company, no engineer could call any engine 'his engine.' The engines belonged to the company, and it could furnish any engine for any run." I charge you that.

"19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty." I charge you that.

"20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in ad-

vance of the leaving time of the train for which he is called." I charge you that.

(R. p. 147.)

Any apparent inconsistency among the witnesses as to the time given in their testimony is probably caused by the fact that the time changes at Cayce, Central time prevailing from Cayce to the south, and Eastern time prevailing from Cayce to the north. The time given in the schedule, at page 137 of the record, is Central time.

On the night of January 11th, intestate came into Cayce on No. 59 at 8:50 p. m., Central time, or 9:50, Eastern time. He was required to bring his train on through the Cayce yards to the Columbia terminal, where the train was cut off, and then intestate ran his engine back to the Cayce yards. Upon arriving at the Cayce yards, his duties required him to place his engine in one of the several sidetracks, used for the purpose of accommodating engines brought in by engineers from their runs and engines placed by hostlers to be taken charge of by engineers going out on their runs. These tracks were located in the vicinity of the yard office and between the yard office and the roundhouse. They were distinct and separate from the roundhouse, that is, they were not in the roundhouse. These tracks were a part of the yards, although engines left thereon were frequently taken into the roundhouse by hostlers by way of the turntable, when it was proper so to do. The engineers never took the engines into the roundhouse and never brought engines out of the roundhouse. They left the engines on these tracks when they came in from their runs, and they received and inspected their engines on these tracks before they went out on their runs. Intestate had his choice as to which of these tracks he would choose to leave his engine on, the only requirement being that he clear the main line. (Riggs, pp. 29, 32, 38-41; Horsford, pp. 50-51.)

Intestate did in fact stop his engine just clear of the yard master'e office, which was about one thousand feet north of the roundhouse, some time before 10:30 p. m., Cen-

tral time. This was after he had brought his engine back from the Columbia terminal to the Cayce yards. Intestate was then required to make an inspection of his engine at this place, and at this time, and to make out a work report if anything was necessary to be done to the engine before it went out upon its next run. He was then required to go, and actually went, into the machine shop where the book was kept upon which engineers registered off. This machine shop was in the same general building and under the same roof as the roundhouse, but it was a separate and distinct room from the roundhouse, separated therefrom by a cement partition. To go into this machine shop from the tracks up towards the yard master's office, where engineers left and received their engines, and where Padgett had actually left his engine, it was neither necessary nor convenient to go into that room or portion of this building designated as the roundhouse, and wherein the pit in question was located. The machine shop was a room north of the roundhouse and between the roundhouse and the tracks on which the engines were left, and to go into the machine shop from such tracks, ingress and egress were had by a door on the north side of the machine shop room, that is, the opposite side from the roundhouse room, making it neither necessary nor convenient to pass through the roundhouse, which was to the south of the machine shop. The act of registering on and off was the only duty which carried engineers even within the vicinity of the roundhouse building, and at the time of Padgett's death the registry book was in the machine shop, and the proper mode of ingress and egress to this room and the registry book would not carry engineers even within the room known as the roundhouse, wherein the drop pit was located. (Garrett, pp. 56-57, 72-73; Purvis, pp. 79-90; Radford, pp. 91-95, 98-103; Freeman, pp. 103-108, 110-112, 115-118; Beville, pp. 120-122, 124-126.)

After leaving his engine, No. 35, on the track near the yard master's office, intestate went to the machine shop where he registered off in his own handwriting as follows:

"Date Jan. 11/ Section ——/ Train 62/ Engine 35/ Relieved 10:30 p. m./ Engineer Padgett/ Fireman McDonald/ No. of hours off duty before beginning this trip —/ No. of hours on duty making this trip —/ Remarks. Rest Claimed, New Address, Leave of Absence, Etc.——" It is presumed that Padgett inspected his engine before leaving it at the yard master's office, and if he had found any work to be done upon it, it was his duty to have made out a work report at the engine and then filed it in a box provided for this purpose at the same place that the registry book was located, that is, in the machine shop. It does not appear that any work report was so made out by Padgett at this time or at the conclusion of this trip up on train No. 62. The statement of the defendant in error to this effect is entirely incorrect. (Lindler, pp. 131-132.)

This concluded Padgett's duties and he had no further duties to perform until after being called one hour and fifteen minutes before the departure of train No. 59 on the morning of the 12th, scheduled to leave at 6:10 a. m., Central time (p. 137), and then he would be required to take charge of his engine on one of the tracks up near the yard master's office at 5:40 a. m., Central time (Rules 22, 23, p. 136).

Plaintiff attempted to establish that Padgett was instructed to hold himself ready to go back to Savannah on train No. 43, scheduled to leave at 11:49 p. m., on the 11th, Central time (pp. 44-45), but this witness admitted that before train No. 43 left, Padgett knew that he would not be required to go out on this train, but would await his regular run (pp. 49-50). Purvis, Superintendent, stated that he never contemplated using Padgett as engineer on No. 43; that he did contemplate using Padgett's engine, No. 35, but that this idea was changed before No. 43 left, and Padgett was so informed (p. 78).

The witnesses agreed that Padgett was in Cayce after having registered off at 10:30 p. m., Central time, and that he remained talking to Engineer Radford until about 12:30 a. m., Central time, when Radford backed his engine out to

take No. 43 (pp. 91, 92). He then went over to a hotel run by an outsider, Darden, with Engineer Freeman (pp. 106, 107). He was then seen by the witness, Cline, about 1:30, going toward the roundhouse (p. 10). When the engine that went north on train No. 66, scheduled to leave about 4:25 a. m., on the 12th, Central time, was taken out of the roundhouse, Padgett was found asleep on this engine (p. 137). The witnesses place this at about 4 o'clock in the morning, evidently speaking of Eastern time, which would make it 3 o'clock, Central time. Plaintiff then endeavored to establish by this hostler's crew that Padgett, having ridden out to the coal chute on this engine, made inquiry as to where his engine was, was informed that it was on track No. 3 in the roundhouse, and that Padgett went back to the roundhouse for the purpose of seeing if the boxes had been packed. The trial Judge, however, struck out all such testimony, and the only evidence in the record is that Padgett was seen going back to the roundhouse about 4 o'clock, Eastern, or 3 o'clock, Central time. (Cline, p. 13; Riggs, pp. 31-33; See pp. 34-37; Horsford, pp. 43-46.)

Padgett's engine was never placed in the roundhouse during the night of the 11th and 12th. On the engineer's registry book, Padgett's engine was registered as No. 35 after this trip. On a stub of the time slips, which was produced from plaintiff's possession, and on the stub of which, covering this trip, erasures had been made, which have never been explained by plaintiff, his engine was given as No. 67. If written by Padgett this stub was evidently written during his trip up to Cayce. The witnesses, Cline, Wallace, Riggs and Horsford, attempted to testify that Padgett's engine was in the roundhouse, but they each admitted that they did not know whether it was 35 or 67 (pp. 13-14; 24-25, 26-27; 30-33, 35; 46, 47, 52). Freeman testified that he brought in engine 67 on the night of the 11th from Savannah (pp. 103-104). Beville testified that Padgett had been running engine 67 before the night of the 11th, but that Padgett came in on No. 35 on the night of the 11th, and Beville took out engine No. 67 on the morning of

the 12th (pp. 119, 120). Aldridge testified that Padgett came in on engine No. 35 and that this engine was to go out on train No. 59 the next morning; that he had charge of this engine when it came in and placed it ready for going out, and that the engine was never in the roundhouse (pp. 127, 128). Padgett was never located by the call boy when the call boy went out about 5:45 a. m., Eastern time, to find him to go out on train No. 59 at 6:10 a. m., Central time (p. 26), and he was later found dead in the pit.

I.

THE MOTION TO DISMISS.

The motion to dismiss is founded upon the grounds:

1. That the right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was not specially set up or claimed by defendant within Section 237 of the Judicial Code.

2. That the ninth assignment of error (R. p. 163) does not present a Federal question, and,

3. That this Court will not review the findings of fact in the lower Courts.

We shall undertake to answer each of these propositions out of order.

1. That the right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was not specially set up or claimed by defendant within Section 237 of the Judicial Code.

From the statement of facts preceding, the Court will see that the complaint specifically alleged that the defendant was a common carrier by railroad, engaged in commerce between several of the States, and that plaintiff's intestate was injured by the negligence of the defendant while he was employed by the defendant in such commerce. These are the essential allegations, determining the application, and, consequently,

the exclusive jurisdiction of the Federal Act. *Seaboard Air Line Railway vs. Duvall*, 225 U. S., 477, 56 L. ed. 1171; *Grand Trunk Ry. vs. Lindsay*, 233 U. S., 838, 58 L. ed., 838. The cause of action was, therefore, predicated entirely upon the Federal Act, which superseded all State law governing the same field, although the latter might have given to plaintiff a cause of action in the absence of the existence of the Federal Act. The Federal Act is exclusive, independent, self-sufficient, supreme. It can not be interfered with, pieced out or detracted from by any State law—common, statutory or constitutional. *Mondou vs. Ry.*, 223 U. S., 1, 56 L. ed., 327; *Michigan Cent. Ry. vs. Vreland*, 227 U. S., 59, 57 L. ed., 417.

At the conclusion of the testimony in the trial Court, the defendant made the following motion and the trial Court the following ruling thereon:

The defendant moves the Court for the direction of a verdict in its favor upon the following grounds:

1. Because there is an entire failure of evidence to support the material allegations of the complaint.

2. Because the plaintiff has failed to produce evidence admitting of the inference that Lewis H. Padgett was employed in interstate commerce at the time of his injury and death.

3. Because the entire evidence does not admit of the inference that Lewis H. Padgett, plaintiff's intestate, was employed in interstate commerce at the time of his injury and death.

4. Because the entire evidence does not admit of the inference that there was any negligence on the part of the defendant, its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate.

5. Because, upon the entire evidence, the only inference is that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death.

The Court (after hearing arguments) said: Gentlemen, we have been taking testimony in this case for two days. Now, if there is any testimony whatever in that record, it

has got to go to the jury. You know a scintilla of testimony is a very minute piece of testimony, and I will say there is a scintilla somewhere in that record, and I am going to overrule the motion and let the jury decide the case. (R., pp. 137, 138.) This motion was made pursuant to Rule LXXVII of the Circuit Courts of South Carolina, as follows: "Objections for Want of Evidence—Remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit or a motion to direct the verdict, and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict." Code of Laws of South Carolina, 1912, Volume II, p. 756.

The Supreme Court of South Carolina has uniformly sustained this practice, and when a motion is made to direct a verdict at the conclusion of the testimony, as was done in this case, it then becomes a question of law for the Supreme Court to determine whether the Circuit Court committed error in refusing such motion. *Guess vs. A. C. L. Rd. Co.*, 88 S. C., 87; *Wyatt vs. Cely*, 86 S. C., 539, 544; *Baker vs. Telegraph Company*, 84 S. C., 477. See the application of this rule of practice in the Supreme Court of South Carolina in a case arising under the Lord Campbell's Act of South Carolina, *Stone vs. A. C. L. Rd. Co.*, 96 S. C. 228, and also to the point properly made in a case governed by the Federal Act, *Jones vs. C. & W. C. Ry.*, 98 S. C., 197 (Advance Sheet No. 2).

The disposition of such a question in the Supreme Court of South Carolina is provided by Rule XXVII of that Court as follows:

"Reversal for Lack or Failure of Evidence.—Whenever an appeal to this Court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the Circuit Judge: *Provided*, That this rule shall not be ap-

plicable when the cause of action was not barred by the statute of limitations, at the time said orders were referred on circuit, but would be barred at the time they were reversed by the Supreme Court."

Code of Laws of South Carolina, Volume II, p. 731. See the application of this rule in *Crosby vs. Ry.*, 83 S. C., 575.

The practice in the trial Courts of South Carolina, the Courts of Common Pleas, does not require the saving or making of an exception before the jury leaves the bar or at any time before the rendition of verdict or entry of judgment. This practice is governed by Section 384 of the Code of Civil Procedure of South Carolina (Code of Laws of South Carolina, 1912, Volume II, p. 147), which provides as follows:

> "384. Notice of Intention to Appeal—Serving Case With Exceptions—Objections and Alterations.—1. In every appeal to the Supreme Court from an order, decree or judgment granted or rendered at chambers, from which an appeal may be taken to Supreme Court, the appellant or his attorney, shall, within ten days after written notice that the said order has been granted or decree or judgment rendered, give notice to the opposite party or his attorney of his intention to appeal, and in all other appeals to the Supreme Court the appellant or his attorney shall, within ten days after the rising of the Circuit Court, give like notice of his intention to appeal to the opposite party or his attorney, and within thirty days after said notice the appellant or his attorney shall prepare a case with exceptions and serve them on the opposite party or his attorney. The respondent within ten days after service of such case may propose any objections thereto or alterations thereof, and the case should be settled in such mode as may be provided in the rules of the Supreme Court: *Provided*, That whenever a motion for a new trial upon the Judge's minutes shall have been made, and the decision thereon not be both heard and

filed at the term at which the trial is had, then notice of intention to appeal either from the judgment or the order granting or refusing a new trial shall be given to the opposite party or his attorney within ten days after written notice that such order has been granted or rendered."

It will be observed from pages 148 and 149 of the record that notice of intention to appeal, and the case and exceptions on appeal to the Supreme Court of South Carolina were duly served, it being entirely permissible for the time for the service of the case and exceptions to be extended by agreement, and a reference to page 153 of the record will show the stipulation between counsel concluding this proposition. A reference to exceptions II, III, IV, V and XI, pp. 149-152 of the record, will show that the rulings of the trial Court upon the grounds advanced for the direction of a verdict in favor of the defendant were properly saved for consideration by the Supreme Court. The rulings of the Supreme Court of South Carolina upon this question are particularly assigned as error for the consideration of this Court by assignments of error 1, 4 and 7 (R. pp. 160, 161, 162).

The practice in South Carolina also provides that the charge of the trial Judge is the law of the case, and that the verdict of the jury must conform to the law, so that if there be no evidence to support the verdict under the charge, a motion for a new trial on the minutes, on such ground, raises a legal question, which, upon exception duly saved, within thirty days after the service of notice of intention of appeal (or this time duly extended), raises a question of law for the consideration of the Supreme Court. *Dent vs. Bryce,* 16 S. C., 1; *Thompson vs. Lee,* 19 S. C., 489; *McCord vs. Blackwell,* 31 S. C., 138; *Buist Company vs. Lancaster Co.,* 68 S. C., 526; *Towles vs. Ry.,* 83 S. C., 504. This rule does not obviate the necessity of complying with Circuit Court Rule LXXVII, but it is commonly adopted to raise such legal questions on a motion for a new

trial, so as to give the opportunity for extended argument, and give the trial Judge an opportunity to correct his rulings on the motion for the direction of a verdict, if persuaded of error. We call attention to the grounds of defendant's motion for a new trial on the minutes numbered 1, 2, 3, 4, and 5 (R. pp. 147, 148). The defendant's requests referred to in such grounds are found in the trial Judge's charge beginning at the bottom of page 143 of the record. We also call attention to the fact that the ruling of the trial Court on each of these grounds, respectively, were saved for the consideration of the Supreme Court of South Carolina by Exceptions VI, VII, VIII, IX and X (R., pp. 150, 151); and that the rulings of the Supreme Court of South Carolina upon such exceptions are saved in the essential particulars for the consideration of this Court by the specific assignment of errors numbered 2 and 5 (pp. 160-161).

These considerations show that at the first possible moment, and in the first possible Court, the defendant below made the point as required by the State practice, to wit: 1st. That there was no evidence that plaintiff's intestate was employed in interstate commerce at the time of his death, within the meaning of the Federal Act. 2nd. That there was no evidence of negligence on the part of defendant towards plaintiff's intestate, within the meaning of the Federal act; and, 3rd. The only inference to be drawn from the testimony was that plaintiff's intestate assumed the risks of the dangers causing his death, within the meaning of the Federal Act; and a reference to the majority opinion will show that the Supreme Court of South Carolina considered these essential points which were the immunities claimed by the defendant below under the Federal Act, and that such decision was against such rights and immunities specially set up and claimed by defendant within Section 237 of the Judicial Code.

In one of the latest utterances of this Court, it is expressly decided that a Federal question will be regarded as properly raised at the proper time and place in instances

where the State Court of last resort holds that such "question is made before it, according to its practice," and proceeds to determine it. *Miedreich vs. Lanenstein*, 232 U. S., 236, 58 L. ed., 584; and in *N. C. Ry. Co. vs. Zachary*, 232 U. S., 248, 58 L. ed., 591, it is expressly held that, as "the highest Court of the State either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this Court render it clear that it is our duty to pass upon the merits of the Federal right and Federal question," and this Court again in *St. Louis, I. M. & S. R. Co. vs. Hesterly*, 228 U. S., 702, 57 L. ed., 1031, said, in answer to an objection that the Federal question was not properly raised, that as the Supreme Court of the State had treated the request "for a ruling that the plaintiff could not recover damages for pain," as intended to raise the question, the objection was not an open one in this Court. We respectfully submit that these considerations show a conclusive answer to the first point made in the motion to dismiss.

3. That this Court will not review the findings of fact in the lower Courts.

In *St. Louis, I. M. & S. R. Co. vs. McWhirter*, 229 U. S., 265, 57 L. ed., 1179, the serious contention advanced against the jurisdiction of this Court to review the facts was that the complaint stated a cause of action at common law as well as one under the Federal Employers' Liability Act, combined with an alleged delict under the Safety Appliance Act, and since the judgment of the Court of Appeals of the State of Kentucky could be referred to the cause of action at common law, it did not necessarily involve a denial of a right or immunity of defendant under the Federal statutes and this Court was without jurisdiction to review the facts. There can be no such contention in this case, as the cause of action here is entirely and absolutely predicated upon the Federal Employers' Liability Act.

In the *McWhirter* case, it appears that "at the conclusion of all the evidence, the defendant requested the Court to instruct the jury to find in its favor. The Court refused to do so, and an exception was noted." (229 U. S., 274.) A motion to dismiss was made upon the grounds stated above and the answer of this Court thereto is so conclusive of the questions made in this case that we are content to rely upon it.

This Court said:

> "The contention wants foundation in fact. As we have seen, the pleadings in express terms, exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. It is true that, although the case was exclusively rested upon Federal statutes, as it comes here from a State Court, our power to review is controlled by Rev. Stat., Sec. 709, U. S. Comp. Stat. 1901, p. 575, and we may, therefore, not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under the statute because, when properly applied, no liability on his part from the statute would result. *Seaboard Air Line R. Co. vs. Duvall,* 225 U. S., 447, 56 L. ed., 1171, 32 Sup. Ct. Rep., 790; *St. Louis, I. M. & S. R. Co. vs. Taylor,* 210 U. S., 281, 52 L. ed., 1061, 28 Sup. Ct. Rep., 616. And, of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense, therefore, alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. *Swafford vs. Templeton,* 185 U. S., 487, 46 L. ed., 1005, 22 Supt. Ct.

Rep., 783. If, as is inferable from the argument, reliance is placed on the ruling of the Court below that there was evidence tending to show negligence on the part of the engineer, for the purpose of establishing that even if a Federal question was passed upon, the case was also decided on an independent non-Federal ground, broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson vs. Lagow*, 12 How., 98, 13 L. ed., 909, the Court, speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a State Court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the Court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this Court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this: that the power to review a Federal question which has been expressly decided by a State Court does not obtain where such Court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that, coming from a State Court, the power to review is controlled

by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City Southern R. Co. vs. C. H. Albers Commission Co.*, 223 U. S., 573, 591, 56 L. ed., 556, 565, 32 Sup. Ct. Rep., 316; *Creswill vs. Grand Lodge, K. P.*, 225 U. S., 246, 56 L. ed., 1074, 32 Sup. Ct. Rep., 822. * * * * *

"It is to be observed, however, that even if, for the sake of argument, the broad expressions of the Court below and those of the trial Court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a casual connection between the injury complained of and such *per se* negligence, the concession would not avoid the Federal question or remove the error. We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; or, conversely speaking, whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right, on the one part, of the plaintiff, or the immunity, on the other part, of the defendant, depending exclusively upon the statute, were, in the nature of things, both necessarily Federal, since they were, from the point of view of the statutes, correlative. Assuming then that, as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that, as there

was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of."

ERRONEOUS LEGAL CONCLUSIONS OF STATE COURT UPON FACTS FOUND.

While we do not admit for an instant that the undisputed testimony reasonably admitted of the inferences of fact set forth by the Supreme Court of South Carolina in its opinion, we submit that even upon the facts found by the Supreme Court of South Carolina, it erred as a matter of law in concluding: 1st. That the evidence justified the inference that plaintiff's intestate was employed in interstate commerce within the Act at the time of his death. 2nd. That there was evidence of negligence on the part of defendant towards plaintiff's intestate proximately causing his death, within the meaning of the Act, and, 3rd. That plaintiff's intestate did not assume the risks of the dangers causing his death, within the meaning of the Act. (See opinion, beginning at page 153.) These errors are saved for the consideration of this Court by the specific assignment of errors numbered 3 (p. 161), 6 (p. 162), and 7 (p. 162).

Even if this Court should depart from the principles announced in the very recent *McWhirter* case, *supra*, it must surely consider whether the Supreme Court of South Carolina erred in its conclusions of law upon the facts found by it, which conclusions specifically deny the three specific rights and immunities specially set up and claimed by defendant below under the Federal Act. To hold otherwise would be for this Court to renounce its jurisdiction in

practically every case under the Federal Employers' Liability Act. There can be no difference, as a legal proposition, in an erroneous application of the Federal Act to a state of admitted facts and a consequent denial of defendant's right to immunity from a judgment under such Act upon such admitted facts, and an erroneous construction and application of the terms of the Act itself. In other words, the success of the contention of the defendant in error on this motion would be a final renouncement of the jurisdiction of this Court in all cases under the Act and a relegation of them to a final decision by the Supreme Courts of the States.

2. That the ninth assignment of error (R. p. 163) does not present a Federal question.

Without unduly protracting this brief, we call attention to defendant's exception XII in the Supreme Court of South Carolina (R. p. 152), and assignments of error 8 and 9 in this Court (R. pp. 162-164). Referring to the practice in the Courts of South Carolina heretofore explained, and the manner in which this exception was taken for the Supreme Court of South Carolina, passed upon by that Court and saved for the consideration of this Court, we submit that *Seaboard Air Line Railway vs. Horton*, 223 U. S., 492, 58 L. ed., 1062, is entirely conclusive in answer to this point.

II.

THE MOTION TO AFFIRM.

In view of the considerations above noted, it can not be necessary to discuss the contention of the defendant in error that the Federal questions here presented are frivolous. On the contrary, it is so manifest that Federal questions are presented and that the rulings in respect to them below were erroneous, that if the rules and practice of this Court permitted, it would be to the interest of all concerned to disencumber the docket of this case by a reversal on this hearing, since if this can not be done, that result must

inevitably follow when the case is reached regularly on the merits.

If the Court should be in doubt upon this point we would respectfully ask its consideration to the briefest possible discussion of the elementary propositions involved.

IS THERE EVIDENCE THAT INTESTATE CAME TO HIS DEATH "WHILE EMPLOYED IN INTERSTATE COMMERCE" WITHIN THE ACT?

The Act applies only to "injuries occurring when the *particular service in which the employee is engaged* is a part of interstate commerce" (*Illinois Cent. Rd. Co. vs. Behrens*, 233 U. S., 473), or to injuries sustained "while the *employee is employed by the carrier* in such commerce." (*Pedersen vs. Rd. Co.*, 229 U. S., 150.) (Italics added.)

The Act does not apply except when the relation of master and servant exists. This relation exists only when the employee is "acting within the line of his duty as an employe;" while the employee is performing service for the master under the contract of employment. Since intestate was employed to inspect his engine at a designated time and at a place made safe for his work, he was not "employed" when he voluntarily undertook the performance of this work at a different time and at a different, unsafe and dangerous place—where, and because of, his deviation from his employment, he suffered the evil results of which his administratrix now complains. See 3 Elliott on Railroads, 2nd Edition, Section 1303; *Patten vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. ed., 361.

This discussion assumes that intestate went into the roundhouse to inspect his engine—an assumption not only based upon the purest conjecture and speculation, but contrary to the only reasonable inference that he went into roundhouse to go to sleep upon another engine. The Supreme Court of South Carolina has itself previously said, in *Crosby vs. Ry.*, 81 S. C., 31:

> "As declared in *Taylor vs. Ry.*, 78 S. C., 556, a scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind

of a reasonable juror. The law affords no redress for wrongs which exist wholly in the imagination. Verdicts can not be allowed to rest upon mere surmise, conjecture or caprice. The law is moved by material evidence, including proven facts and those presumptions which the law recognizes from motives of public policy and as founded in human experience. A Court fails to exercise its high prerogatives to administer justice according to law when it permits a verdict to stand which finds no support in evidence."

The minority opinion is clearly correct in concluding that there was no evidence justifying the inference that intestate went into the roundhouse in the performance of any duty of his employment, and then, beyond peradventure, he was not employed within the Act. *Benson vs. Lancashire & Yorkshire Railway Co.*, Law Reports, 1904, 1 King's Bench, 242; *Ellsworth vs. Metheny*, 104 Fed., 119, 44 C. C. A., 484; *Russell vs. Short Line Rd. Co.*, 155 Fed., 22, 83 C. C. A., 618; *St. Louis, S. R. Co. vs. Harvey*, 144 Fed., 806, 75 C. C. A., 536.

IS THERE EVIDENCE OF NEGLIGENCE PROXIMATELY RESULTING IN THE DEATH OF PLAINTIFF'S INTESTATE?

Assuming for a moment that the roundhouse was incomplete and that, as an abstract proposition, in order to protect the safety of employees whose duties required them to go into the roundhouse at night, the roundhouse should have been lighted and the drop pit covered or protected, this question must still be answered in the negative. The Supreme Court of South Carolina, even in its finding of fact, admits that intestate was not required to go into the roundhouse to inspect his engine at any time. The duties of engineers did not carry them into the roundhouse room at any time. The duties of hostlers and machinists carried them into the roundhouse at times, says the Supreme Court of South Carolina, and because of this, there was evidence of negligence on the part of defendant towards intestate,

an engineer, in failing to have the roundhouse lighted and the pit guarded.

The answer to such a conclusion is apparent. Defendant could not anticipate that intestate would undertake, voluntarily, to perform the duty of inspection at a different time and different place from that required by his duties. Defendant could not anticipate that intestate would go into the roundhouse at any time to perform any duty, and ordinary care did not, therefore, require defendant to make the roundhouse safe for him—consequently, defendant was under no duty to intestate in this particular. *Stone vs. Railroad Co.*, 96 S. C., 228, 238. Conversely, if the failure to have the roundhouse safe could be considered, as an abstract proposition, as negligence towards the hostlers and machinists, it was not the proximate cause of intestate's death, since intestate's entrance into the roundhouse and fall into the pit could not be considered a "result naturally and reasonably to be expected therefrom." "It was not the natural and probable consequence and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the" roundhouse. *Scheffer* (15 Otto), 105 U. S., 449, 26 L. ed., 1070; *Murphy vs. Rd. Co.*, 89 S. C., 15 at 23.

ASSUMPTION OF RISKS.

Intestate was a man of thirty-four years of age, in possession of good faculties, unusual intelligence and several years' experience as a railroad engineer. He had been running into the Cayce yards for several months while the roundhouse had been under construction and had made three trips in and out since the roundhouse had been in use. He had been into the roundhouse earlier on the very night he was killed. He had three torches on his engine (p. 53), but went in without using one. There is no suggestion that in going into the roundhouse he acted under even the request, much less the direction, of any representative of the master. His action in so doing was entirely voluntary. Under these undisputed facts, he assumed the

risks of the defects in the roundhouse, if any, under the principles announced by this Court in *S. A. L. Ry. vs. Horton, supra.* But, in addition to this, the trial Judge, in instructing the jury that the servant, under no circumstances, assumed the risks of any defects due to the negligence of the master, absolutely violated the rule announced in the *Horton* case, and it is for this Court to say what is the proper conclusion from the testimony and determine whether this admitted error was prejudicial to the immunity to which the defendant was entitled under the Federal Act.

CONCLUSION.

The manner in which plaintiff's intestate came to his death, and the cause thereof, is entirely speculative and conjectural. Plaintiff's theory of the case is not supported by a particle of competent testimony in the record. As said by this Court in the *Patten case, supra,* "If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from any rules of proof resting upon the plaintiff."

III.

THE MOTION TO ADVANCE.

The statement appears in the brief by defendant in error that the purpose of the writ to this Court is only for delay. In refutation of this statement, we respectfully call the Court's attention to the record facts that the judgment of the Supreme Court of South Carolina was filed on November 18th, 1914 (R. p. 158); that the writ of error and incidental record was filed in the Supreme Court of South Carolina on November 28th, 1914, within the ten days allowed under Rule XX of the Supreme Court of South Carolina,

during which time the remittitur stays in that Court, and that the record was filed in this Court on November 30th, 1914, within twelve days from the rendition of the judgment of the Supreme Court of South Carolina. We also call attention to the fact that this record was immediately printed and filed in this Court before December 26th, 1914. So averse is plaintiff in error to any suggestion of delay on its part that it offers no objection to the advancement of the case to the summary docket, although it feels that the limit of time for oral argument on such docket will hamper its counsel in the proper presentation of the case.

Respectfully submitted,

J. B. S. LYLES,
Attorney for Plaintiff in Error.

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JAMES D. MAHER
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 710

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error on the Merits.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

THE STATE CO., COLUMBIA, S. C.

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J. B. S. LYLES,
Attorney for Plaintiff in Error.

STATEMENT FOR PLAINTIFF IN ERROR.

The writ of error brings up a judgment of the Supreme Court of South Carolina, filed November 18th, 1914, affirming a judgment of the Court of Common Pleas for Lexington County, South Carolina, in the sum of $20,000 and costs entered on a verdict in favor of plaintiff below.

The suit was a civil action commenced on June 20th, 1913, by the plaintiff, Clara V. Padgett, administratrix of the estate of Lewis H. Padgett, deceased, for the benefit of herself and eight dependent children, against Seaboard Air Line Railway, defendant, under the Federal Employers' Liability Act of Congress, to recover damages for the death of said intestate, alleged to have been caused by the

negligence and wrongful acts of the defendant on January 12th, 1913, while said intestate was employed by defendant as a locomotive engineer in interstate service.

The references made are to the printed transcript of record.

ISSUES RAISED BY PLEADINGS.

The complaint alleged that the defendant was an interstate carrier engaged in the conduct of a general railroad business in and through the States of Virginia, North Carolina, South Carolina and Georgia, and that it owned and controlled a railroad yard composed of several tracks, roundhouse and other appurtenances at Cayce, in Lexington County, South Carolina (Complaint, paragraphs 2 and 3, R., p. 2). This was admitted by the answer (Answer, paragraphs 2 and 3, R., p. 5). The complaint further alleged that at the time of his death, plaintiff's intestate was discharging his duties as an interstate employee and was in the service of the defendant as a locomotive engineer, running between the city of Savannah, Georgia, and Cayce, Lexington County, South Carolina, and that on the night of his death, the said intestate, in the discharge of his duties as such locomotive engineer in interstate service, went into the roundhouse of the defendant in its Cayce yards and there met instant death by falling into a drop pit. (Complaint, paragraphs 3-7, R., pp. 2, 3.)

The answer admitted the death of intestate, but denied the allegations of fact to the effect that he was in the service of the defendant or discharging any duties incident to his employment when he went into the roundhouse and fell into the pit. (Answer, paragraphs 3-7, R., p. 5.) The answer further set up as a second defense that intestate did not go into the roundhouse in the performance of any duties as engineer for defendant, but, on the contrary, without even permission or license of defendant, and as a trespasser. (Second defense, R., pp. 5-6.)

The complaint further alleged that the death of intestate was caused by the negligence of the defendant, its officers, agents and employees, in allowing the roundhouse at Cayce to be used before completed and while in an unsafe and dangerous condition, and directing and permitting intestate to go to his engine, which was in the roundhouse standing over an open and unprotected pit, in the night-time, with no lights or other protection therein, and further in not relieving intestate from duty on the night he was killed, but on the other hand, holding him on duty and in suspense during the night. (Complaint, paragraphs 8, 9, R., pp. 3, 4.) The answer denied these allegations of negligence (Answer, paragraphs 8 and 9, p. 5.) The answer further set up, as a third defense, contributory negligence on the part of intestate, and as a fourth defense, assumption of risks on the part of intestate (R., p. 6). The complaint specifically alleged that the action was brought under an Act of Congress, passed April 22, 1908, and amendments thereto, known as the Federal Employers' Liability Act (Complaint, paragraph 5, p. 3).

STATEMENT OF EVIDENCE.

An understanding of the undisputed testimony, together with all reasonable inferences to be drawn therefrom, will, in our opinion, largely conclude the questions now before the Court, and we undertake to give such a statement as follows:

The roundhouse of defendant in its Cayce yards, was built to house engines temporarily, and was put into service on January 5th, 1913, just one week before intestate's death. The roundhouse is semicircular in shape and contains ten tracks, which converge at its entrance so as to allow engines to be run into it upon any one of these tracks, from a single track turntable, located immediately in front of the roundhouse, to the south, in which direction the roundhouse opens. Between and under the rails of

each of these tracks is a pit some four feet in depth, running the entire length of each track in the roundhouse, so that machinists can go underneath the engines on such tracks for the purpose of repairing them. In addition to the pits beneath and under each of these tracks, there is another pit some seven feet in width and ten feet ten inches in depth, which runs between tracks two and three, at right angles to them. This is a drop pit, so-called because used for the purpose of dropping driving wheels off of an engine on one of these tracks and transferring the wheels to the other track upon which they are taken out. This is the pit in which intestate was found dead on the morning of January 12th, 1913. (Witness Cline, pp. 7-8; Chisolm, pp. 17-18; Garrett, pp. 55-56, 58-60, 65-66.)

Plaintiff contended that the roundhouse was incomplete because the drop pit had not been covered and no lights had been installed in the roundhouse. Defendant contended that the roundhouse was complete. There is no evidence in the record that the pit was subsequently covered or lights subsequently installed in the roundhouse. The trial Judge overruled the efforts of plaintiff's attorneys to introduce such evidence. (Cline, p. 9; Chisolm, p. 18; Horsford, p. 48; Hooper, p. 65; Garrett, pp. 66-71.)

The evidence was undisputed that no lights were installed in the roundhouse and the pit was uncovered at the time of intestate's death. (Cline, pp. 8, 14-15; Wallace, p. 25; Riggs, p. 30; Horsford, p. 48; Hooper, pp. 64-65.) The evidence was, however, that the roundhouse and pit were completed according to specifications. (Garrett, pp. 66-71.)

Intestate had been in the service of defendant as a freight engineer for a number of years. He had been promoted to his passenger run on the same day that the roundhouse was put in service. His run was local passenger No. 59, from Cayce to Savannah, scheduled to leave Cayce at 6:10 a. m., Central time, and the corresponding train, No. 62, from Savannah to Cayce, scheduled to arrive at Cayce at 8:50 p. m., Central time. He went down one day

and back the next. He had made three trips into the Cayce yards on this run since the roundhouse had been in use, and had, of course, made numerous trips as a freight engineer during the construction of the roundhouse. On the day in question he left his home in Savannah at 3 p. m.

Under the agreement between the engineers, including the plaintiff, and the defendant company, effective at the time of intestate's death, and containing the rules and regulations specifying the duties and work of engineers, hostlers and machinists were provided at the Cayce yards to take entire charge of engines brought into the Cayce yards by engineers, and make such engines ready to go out upon their runs (Rule 24, R., p. 136). The Cayce yards were a part of the Columbia terminals (two miles distant) and this rule applied there (R., p. 80). Rule 27 provided: "27. Engineers will not be held responsible for engine after being relieved from duty." Rule 23 provided: "23. Engineers will be required to take charge of their engines thirty minutes in advance of leaving time of train for which they are called." (R., p. 136.) In construing these rules, the trial Judge very properly charged the defendant's requests 18, 19 and 20, as follows:

"18. Under Rule 21 of the contract between the engineers and the company, no engineer could call any engine 'his engine.' The engines belonged to the company, and it could furnish any engine for any run." I charge you that.

"19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty." I charge you that.

"20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in advance of the leaving time of the train for which he is called." I charge you that.

(R., p. 147.)

Any apparent inconsistency among the witnesses as to the time given in their testimony is probably caused by the fact that the time changes at Cayce, Central time prevailing from Cayce to the south, and Eastern time prevailing

from Cayce to the north. The time given in the schedule, at page 137 of the record, is Central time.

On the night of January 11th, intestate came into Cayce on No. 59 at 8:50 p. m., Central time, or 9:50, Eastern time. He was required to bring his train on through the Cayce yards to the Columbia terminal, where the train was cut off, and then intestate ran his engine back to the Cayce yards. Upon arriving at the Cayce yards, his duties required him to place his engine in one of the several side-tracks, used for the purpose of accommodating engines brought in by engineers from their runs and engines placed by hostlers to be taken off by engineers going out on their runs. These tracks were located in the vicinity of the yard office and between the yard office and the roundhouse. They were distinct and separate from the roundhouse, that is, they were not in the roundhouse. These tracks were a part of the yards, although engines left thereon were frequently taken into the roundhouse by hostlers by way of the turntable, when it was proper so to do. The engineers never took the engines into the roundhouse and never brought engines out of the roundhouse. They left the engines on these tracks when they came in from their runs, and they received and inspected their engines on these tracks before they went out on their runs. Intestate had his choice as to which of these tracks he would choose to leave his engine on, the only requirement being that he clear the main line. (Riggs, pp. 29, 32, 38-41; Horsford, pp. 50-51.)

Intestate did in fact stop his engine just clear of the yard master's office, which was about one thousand feet north of the roundhouse, some time before 10:30 p. m., Central time. This was after he had brought his engine back from the Columbia terminal to the Cayce yards. Intestate was then required to make an inspection of his engine at this place, and at this time, and to make out a work report if anything was necessary to be done to the engine before it went out upon its next run. He was then required to go, and actually went, into the machine

shop where the book was kept upon which engineers registered off. This machine shop was in the same general building and under the same roof as the roundhouse, but it was a separate and distinct room from the roundhouse, separated therefrom by a cement partition. To go into this machine shop from the tracks up towards the yard master's office, where engineers left and received their engines, and where Padgett had actually left his engine, it was neither necessary nor convenient to go into that room or portion of this building designated as the roundhouse, and wherein the pit in question was located. The machine shop was a room north of the roundhouse and between the roundhouse and the tracks on which the engines were left, and to go into the machine shop from such tracks, ingress and egress were had by a door on the north side of the machine shop room, that is, the opposite side from the roundhouse room, making it neither necessary nor convenient to pass through the roundhouse, which was to the south of the machine shop. The act of registering on and off was the only duty which carried engineers even within the vicinity of the roundhouse building, and at the time of Padgett's death the registry book was in the machine shop, and the proper mode of ingress and egress to this room and the registry book would not carry engineers even within the room known as the roundhouse, wherein the drop pit was located. (Garrett, pp. 56-57, 72-73; Purvis, pp. 79-90; Radford, pp. 91-95, 98-103; Freeman, pp. 103-108, 110-112, 115-118; Beville, pp. 120-122, 124-126.)

After leaving his engine, No. 35, on the track near the yard master's office, intestate went to the machine shop where he registered off in his own handwriting as follows: "Date Jan. 11/ Section ——/ Train 62/ Engine 35/ Relieved 10:30 p. m./ Engineer Padgett/ Fireman McDonald/ No. of hours off duty before beginning this trip—/ No. of hours on duty making this trip —/ Remarks. Rest Claimed, New Address, Leave of Absence, Etc.—" It is presumed that Padgett inspected his engine before leaving

it at the yard master's office, and if he had found any work to be done upon it, it was his duty to have made out a work report at the engine and then filed it in a box provided for this purpose at the same place that the registry book was located, that is, in the machine shop. It does not appear that any work report was so made out by Padgett at this time or at the conclusion of this trip up on train No. 62. The statement of the defendant in error to this effect is entirely incorrect. (Lindler, pp. 131-132.)

This concluded Padgett's duties and he had no further duties to perform until after being called one hour and fifteen minutes before the departure of train No. 59 on the morning of the 12th, scheduled to leave at 6:10 a. m., Central time (p. 137), and then he would be required to take charge of his engine on one of the tracks up near the yard master's office at 5:40 a. m., Central time (Rules 22, 23, p. 136).

Plaintiff attempted to establish that Padgett was instructed to hold himself ready to go back to Savannah on train No. 43, scheduled to leave at 11:49 p. m., on the 11th, Central time (pp. 44-45), but this witness admitted that before train No. 43 left, Padgett knew that he would not be required to go out on this train, but would await his regular run (pp. 49-50). Purvis, Superintendent, stated that he never contemplated using Padgett as engineer on No. 43; that he did contemplate using Padgett's engine, No. 35, but that this idea was changed before No. 43 left, and Padgett was so informed (p. 78).

The witnesses agreed that Padgett was in Cayce after having registered off at 10:30 p. m., Central time, and that he remained talking to Engineer Radford until about 12:30 a. m., Central time, when Radford backed his engine out to take No. 43 (p. 91, 92). He then went over to a hotel run by an outsider, Darden, with Engineer Freeman (pp. 106, 107). He was then seen by the witness, Cline, about 1:30, going toward the roundhouse (p. 10). When the engine that went north on train No. 66, scheduled to leave about 4:25 a. m., on the 12th, Central time, was taken

out of the roundhouse, Padgett was found asleep on his engine (p. 137). The witnesses place this at about 4 o'clock in the morning, evidently speaking of Eastern time, which would make it 3 o'clock, Central time. Plaintiff then endeavored to establish by this hostler's crew that Padgett, having ridden out to the coal chute on this engine, made inquiry as to where his engine was, was informed that it was on track No. 3 in the roundhouse, and that Padgett went back to the roundhouse for the purpose of seeing if the boxes had been packed. The trial Judge, however, struck out all such testimony, and the only evidence in the record is that Padgett was seen going back to the roundhouse about 4 o'clock, Eastern time, or 3 o'clock, Central time. (Cline, p. 13; Riggs, pp. 31-33; See pp. 34-37; Horsford, pp. 43-46.)

Padgett's engine was never placed in the roundhouse during the night of the 11th and 12th. On the engineer's registry book, Padgett's engine was registered as No. 35 after this trip. On a stub of the time slips, which was produced from plaintiff's possession, and on the stub of which, covering this trip, erasures had been made, which have never been explained by plaintiff, his engine was given as No. 67. If written by Padgett this stub was evidently written during his trip up to Cayce. The witnesses, Cline, Wallace, Riggs and Horsford, attempted to testify that Padgett's engine was in the roundhouse, but they each admitted that they did not know whether it was 35 or 67 (pp. 13-14; 24-25, 26-27; 30-33; 35, 46, 47, 52). Freeman testified that he brought in engine 67 on the night of the 11th from Savannah (pp. 103-104). Beville testified that Padgett had been running engine 67 before the night of the 11th, but that Padgett came in on No. 35 on the night of the 11th, and Beville took out engine No. 67 on the morning of the 12th (pp. 119, 120). Aldridge testified that Padgett came in on engine No. 35 and that this engine was to go out on train No. 59 the next morning; that he had charge of this engine when it came in and placed it ready for going out, and that the engine was never in the roundhouse

(pp. 127, 128). Padgett was never located by the call boy when the call boy went out about 5:45 a. m., Eastern time, to find him to go out on train No. 59 at 6:10 a. m., Central time (p. 26), and he was later found dead in the pit.

MANNER IN WHICH ISSUES ARE RAISED.

When the testimony was concluded, plaintiff in error (defendant below) moved for a directed verdict upon the grounds:

1. That there was no evidence that intestate was employed in interstate commerce within the Federal Act when he came to his death.

2. That there was no evidence of negligence on defendant's part causing or contributing to intestate's death within the Federal Act.

3. That upon the entire evidence, intestate assumed the risks within the Federal Act.

This motion was refused, the trial Judge ruling: "Gentlemen, we have been taking testimony in this case for two days. Now, if there is any testimony whatever in that record, it has got to go to the jury. You know a scintilla of testimony is a very minute piece of testimony, and I will say there is a scintilla somewhere in that record, and I am going to overrule the motion and let the jury decide the case." (R., pp. 137, 138.)

A reference to exceptions II, III, IV, V and XI, pp. 149-152 of the record, will show that the rulings of the trial Court upon the grounds advanced for the direction of a verdict in favor of the defendant were properly saved for consideration by the Supreme Court. The rulings of the Supreme Court of South Carolina upon this question are particularly assigned as error for the consideration of this Court by assignments of error 1, 4 and 7 (R., pp. 160, 161, 162).

A motion for a new trial upon the minutes was duly made and in it the three legal grounds upon which the mo-

tion for a directed verdict were predicated were duly presented and overruled by the trial court. (See grounds 1, 2, 3, 4 and 5, R., pp. 147, 148. The defendant's requests referred to in such grounds are found in the trial Judge's charge, beginning at the bottom of page 143 of the Record.) These rulings of the trial court were saved for the consideration of the Supreme Court of South Carolina by exceptions VI, VII, VIII, IX and X (R., pp. 150, 151); and the rulings of the latter court are brought here by assignments of error numbered 2 and 5. (R., pp. 160-161.)

In submitting the case to the jury the trial Judge, at plaintiff's request, charged that the servant did not assume the risks of the master's negligence under any circumstances and then, at defendant's request, charged the true rule from *Seaboard Air Line Railway vs. Horton.* See plaintiff's requests charged, numbered 6 and 11 (R., pp. 141, 142), and defendant's request charged, numbered 8½ (R., p. 145). This was excepted to in the Supreme Court of South Carolina (Exception XII, p. 152) and brought here by assignments numbered 8 and 9, pp. 162-164.

SPECIFICATION OF ERRORS RELIED UPON.

SPECIFICATION FIRST.

That the question of directing a verdict should have been determined by the uniform test of sufficient evidence prevailing in the Federal courts and not by the peculiar, local test of *scintilla* of evidence prevailing in South Carolina.

AUTHORITIES CITED.

Crosby vs. Ry., 81 S. C., 31.
Howell vs. A. C. L. Rd. Co., 99 S. C., 404.
Mondou vs. Ry., 223 U. S., 1.
N. C. R. R. Co. vs. Zachary, 232 U. S., 492.
Patton vs. T. & P. R. Co., 179 U. S., 658.
Randall vs. B. & O. R. Co., 109, U. S., 478.

S. A. L. Ry. vs. Horton, 223 U. S., 492.
St. Louis, I. M. & S. R. Co. vs. McWhirter, 229 U. S., 265.

SPECIFICATION SECOND.

That the Supreme Court of South Carolina erred in ruling upon the entire evidence that there was evidence to justify the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death. Assignments of error numbered 1 and 2 (R., pp. 160-161).

AUTHORITIES CITED.

Benson vs. Lancashire & Yorkshire Ry. Co., 1 King's Bench, 242. (1904)
3 Elliott on Railroads, 2nd Edition, Sec. 1303.
Dent vs. Bryce, 16 S. C., 1.
Illinois Central Rd. Co. vs. Behrens, 233 U. S., 473.
Pedersen vs. Rd. Co., 229 U. S., 150.
Towles vs. Ry., 83 S. C., 504.

SPECIFICATION THIRD.

That the Supreme Court of South Carolina erred in concluding, as a proposition of law, upon the facts as found by such Court, that there was evidence justifying the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death. Assignment of error, numbered 3. (R., p. 161.)

AUTHORITIES CITED.

Ellsworth vs. Metheney, 104 Fed., 119.
Patton vs. T. & P. R. Co., 179 U. S., 658.
Russell vs. Oregon Short Line Rd. Co., 155 Fed., 22.
St. Louis, S. W. Ry. vs. Harvey, 144 Fed., 806.

SPECIFICATION FOURTH.

That the Supreme Court of South Carolina erred in ruling, upon the entire case, that there was evidence to justify the submission to the jury of the issue whether defendant below had been guilty of negligence towards intestate, proximately causing or contributing to intestate's death. Assignments of error, numbered 4 and 5 (R., pp. 161-162).

AUTHORITIES CITED.

Ellis, Admr., vs. L. H. St. Ry. Co., 160 S. W., 512.
Kennedy vs. Ry., 59 S. C., 535.
Murphy vs. Rd. Co., 89 S. C., 15.
Scheffer vs. Washington City, etc., Rd. Co., 105 U. S., 449.
Stone vs. Ry., 96 S. C., 228.

SPECIFICATION FIFTH.

That the Supreme Court of South Carolina erred in concluding as a proposition of law, upon the facts found by it, that there was evidence justifying the submission to the jury of the issue whether defendant was guilty of negligence proximately causing or contributing to intestate's death. Assignment of error, numbered 6 (R., p. 162).

SPECIFICATION SIXTH.

That the Supreme Court of South Carolina erred in holding that the entire evidence admitted of any inference except that intestate assumed the risks. Assignment of error, numbered 7 (R., p. 162).

AUTHORITIES CITED.

S. A. L. Ry. vs. Horton, 223 U. S., 492.

SPECIFICATION SEVENTH.

Error in affirming the charge of plaintiff's requests numbered 6 and 11, as follows:

"'6. The servant by virtue of his employment assumes all the ordinary risks and hazards of his employment, and as this case is governed by the Federal Employers' Liability Act, which relates to common carriers or railroads engaged in interstate commerce, the servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier.' I charge you that. That covers what I said here while ago. Under the general law he assumed all the risks, but this is not so under this Federal Act; he merely assumes the risks incident to his employment, except as to that." (R., p. 141.)

"'11. In a case where the relationship of master and servant exists, the servant owes certain duties to the master and the master owes certain duties to the servant. The servant assumes all of the ordinary risks incident to his employment, but he does not assume any extraordinary risks incident to such employment. He does not assume the risks arising from the negligence of the master. The master is required under the law to furnish the servant a reasonably safe place, instrumentalities, machinery, tools, and the like, with which, in which, and by which he is to perform his duties as a servant. If the master fails to do this and injury results as the direct and proximate cause of such failure the master would be liable in damages to the servant so injured.' I charge you that, in connection with what I have said about the assumption of risks." (R., p. 142).

and error in holding such instructions to be not prejudicial to defendant because, as held, there was no evidence to justify the inference that intestate knew of any defects due to defendant's negligence.

And error in holding that such requests were not inconsistent with defendant's request charged, numbered 8½, as follows:

"'8½. If Padgett, before the injury, had knowledge of the alleged defects in the roundhouse, or, if having a reasonable opportunity to inform himself, he ought to have known of such defects, he is presumed, by remaining in the company's service, to have assumed

> the risks if he voluntarily exposed himself to the dangers of such defects, and his beneficiaries cannot recover for his injury or death resulting therefrom, and his knowledge has the same effect whether the defendant was informed or ignorant of such defects. This rule applies with special force if the defects or dangers were obvious to the senses.' I charge you that." (R., p. 145.)

or that such inconsistency was not prejudicial to defendant. Assignments of error, numbered 8 and 9. (R., pp. 162-164).

ARGUMENT.

SPECIFICATION FIRST.

It is the settled law in this Court that the trial Judge must direct a verdict for defendant unless the evidence produced by plaintiff is sufficient to warrant a recovery in his behalf. *Randall vs. B. & O. R. Co.*, 109 U. S., 478, 27 L. ed., 1003; *Patton vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. ed., 361. Under the South Carolina law, the trial court can direct a verdict only when there is not a *scintilla* of evidence. If there is a *scintilla* in favor of plaintiff, the case must go to the jury, even though the evidence "is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." (Quoting from the Patton case, 179 U. S., 659.) This rule is recognized by Rule LXXVII of the Circuit Courts of South Carolina, as follows:

> "Objections for Want of Evidence—Remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit or a motion to direct the verdict, and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict." Code of Laws of South Carolina, 1912, Volume II, p. 756;

and by Rule XXVII of the Supreme Court of South Carolina, as follows:

> "Reversal for Lack or Failure of Evidence.—Whenever an appeal to this Court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the Circuit Judge: *Provided*, That this rule shall not be applicable when the cause of action was not barred by the statute of limitations, at the time said orders were referred on circuit, but would be barred at the time they were reversed by the Supreme Court." Code of Laws of South Carolina, Volume II, p. 731.

In *Crosby vs. Ry.*, 81 S. C., 31, it is said, "a *scintilla* of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."

The purpose of the Federal Act was to establish a uniform rule of liability covering common carriers and their employees while engaged in interstate commerce—such Act superseding the varying rules and regulations effective in the various States through which such commerce may be accomplished. The constitutionality of the Act was upheld upon the ground that "It undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce.

". . . And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." Mondou case, 223 U. S., 1; 56 L. ed., 327. See also *Seaboard Air Line Ry. vs. Horton*, 223 U. S., 492, 58 L. ed., 1062.

This Court has ruled that under Section 237 of the Judicial Code, Rev. Stat., Sec. 709, it has jurisdiction to

analyze the evidence "to the extent necessary to give to plaintiff the benefit of its asserted Federal right." *North Carolina R. R. Co. vs. Zachary*, 232 U. S., 248.

In *St. Louis, I. M. & S. R. Co. vs. McWhirter*, 229 U. S., 265, 57 L. ed., 1179, this Court said:

> "And, of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense, therefore, alone involved determining *whether there was liability under the statute*, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. . . . This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that *there was nothing adequate to go to the jury to show liability under the Federal law.* While it is true, as we have said, that, coming from a State Court, the power to review is controlled by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, *the claim is made and denied that there was no evidence tending to show liability under the Federal law*, such rulings, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. . . . We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; or, conversely speaking, whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right, on the one part, of the plaintiff, or the immunity, on the other part, of the defendant, depending exclusively upon the statute, where, in the nature of things, both necessarily Federal, since they were, from the point of view of the statutes, correlative. Assuming then that, as the result of the hypothesis we have indulged in,

> the case is reducible to the Federal question last stated, we are clearly of the opinion that, as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. *Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities*, for to do so would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of." (Italics added.)

This reasoning is pertinent to the determination by this Court of the Federal questions: Is there evidence that intestate was employed in interstate commerce within the Act? Is there evidence of negligence within the Act? Did the evidence conclusively show that intestate assumed the risks? Because all three must be determined before this Court can say whether defendant below was deprived of a right or immunity, in this case, under the Federal Statute.

What rule or test will this Court follow? The plaintiff in error engages and employs men in interstate commerce in Virginia, North and South Carolina, Georgia, Florida, and Alabama. Is this Court to say that upon a certain state of testimony it is liable under the Federal Act in South Caroliaa, because that State has the *scintilla* doctrine, but that it is not liable in Virginia, upon the identical state of testimony, because that State has the sufficient evidence doctrine? The question of the existence of evidence on these points is the question of the right and immunity of the carrier under the Act. If this question is to fluctuate according to the varying rules of the various States, the liability of the carrier fluctuates according to the State in which it is operating, and the desired uniformity in interstate commerce, which is the sole justification of the Act, disappears.

It is submitted that this Court, seeking uniformity, must adopt the sufficient evidence test, as announced in its

decisions, because this is the only one that prevails uniformly throughout the States of the country.

This question was presented to the Supreme Court of South Carolina in *Howell vs. A. C. L. Rd. Co.*, 99 S. C., 404 (A. S. No. 4). The question there presented was whether the State Court should follow the *scintilla* doctrine prevailing in this State or the sufficient evidence doctrine uniformly prevailing in the federal jurisdiction, in determining whether the evidence conclusively established that plaintiff was engaged in interstate commerce, on a motion to direct a verdict. It is to be noticed that the Court in this case, in declaring what is the rule in South Carolina, gives a much broader construction than that upon which the issue was decided in the case at bar, and is, so far as the writer knows, the broadest statement of the power of the Court to be found in the decisions of this State, but upon the question decided, the case is essentially wrong for four reasons:

1. Article V, Section 26, of the Constitution of South Carolina, 1895, provides: "Charge to Juries. Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision does not forbid the Judge from determining a legal question, and the question in such a situation is whether there is any or sufficient evidence to go to the jury, which is the legal question, and the inquiry is what test shall be followed by the Court in determining this legal question. There is nothing in this constitutional provision which forbids the adoption of the sufficient evidence rule in this State. Our Judges have the right to grant a new trial upon the ground that the verdict is against the preponderance of the testimony, and in granting such a motion, they no more charge the jury with respect to matters of fact than they would if they directed a verdict upon the ground that the evidence was not sufficient.

2. The constitutional provision cited must yield to the federal act within the sphere covered by the latter, and if the federal act, seeking uniformity, requires the adoption

of the sufficient evidence rule in cases tried under it, then the constitutional provision does not apply.

3. The inconvenience or hardship that may result to the Court in applying different rules caused by the injection of the federal act may be unfortunate, but in no wise excuses the Court from performing its definite duty in this particular. The discussion by this Court in the *Mondou* case, 223 U. S. 1, beginning at 55, 56 L. ed. 327, beginning at 348, is a complete answer to this suggestion.

4. The question is not one of procedure in the sense that the procedure of the forum governs the enforcement of the right. The Court says: "As the applicability of the statute is the question at issue, which horn of the dilemma must the Court take?" The determination of the applicability of the statute involves the determination of the right of plaintiff to recover under the statute, as well as the privilege or immunity of the defendant to avoid liability under the statute, which brings us back to the proposition already argued that unless the same test be followed in all Courts to determine this question, then the uniformity of liability sought to be created by the Federal Act will be entirely vitiated.

SPECIFICATION SECOND.

The Act applies only to "injuries occurring when the *particular service in which the employee is engaged* is a part of interstate commerce" (*Illinois Cent. Rd. Co. vs. Behrens*, 233 U. S., 473), or to injuries sustained "while the *employee is employed by the carrier* in such commerce." (*Pedersen vs. Rd. Co.*, 229 U. S., 150.) (Italics added.)

The Act does not apply except when the relation of master and servant exists. This relation exists only when the employee is "acting within the line of his duty as an employee"; while the employee is performing service for the master under the contract of employment. Since intestate was employed to inspect his engine at a designated time and at a place made safe for his work, he was not "employed" when he voluntarily undertook the performance

of this work at a different time and at a different, unsafe and dangerous place—where, and because of, his deviation from his employment, he suffered the evil results of which his administratrix now complains.

The question made here by the pleadings is purely the one whether plaintiff was employed at the time he went into the roundhouse. If he was not employed at all at that time, then he was not employed in interstate commerce. This question is thoroughly discussed by two authorities to which we respectfully refer the Court as conclusive.

3 Elliott on Railroads, 2nd Edition, Section 1303:

"1303. Performing Work Outside of Scope of the Contract of Employment.—Permissive Privilege.—In order to make a party liable in the capacity of an employer for injuries resulting from negligence the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employe. If the time when and place where the injury is received are not within the scope of the contract of employment the relation of master and servant cannot be justly said to exist, and no recovery can be had against a defendant in the character or capacity of a master or employer. We do not say that where there is negligence on one side and freedom from negligence on the other there may not be a recovery if legal grounds for a recovery exist, but we do say that even though there may be negligence on the one side and none on the other there can in no event be a recovery upon the theory that there was a breach of the specific duty which an employer owes to the employe unless it is affirmatively shown that the injury was received while the plaintiff was performing service for the master under the contract of employment. That there is a breach of some duty does not warrant a finding against a party in the capacity of an employer. Where one employed to do a designated kind of work or to work at a particular place voluntarily undertakes to do some other work or goes to a place different from that assigned him by the contract of employment he cannot successfully insist that he is within the protection of

the rule that the master must exercise ordinary care to protect him against injury. The fact that the plaintiff is at some times and some places the employe of a railroad company does not entitle him to hold the company liable in the capacity of an employer when he goes into a place to which the duties of his service do not require him to go. If he goes into a place on the master's premises when he has no duty whatever at such a place he enjoys a mere permissive privilege and, at best, is a mere licensee, and if there be any liability to him it is only for a breach of the duty which an owner of premises owes to a licensee. Upon the principle that an employer is not liable to an employe who voluntarily does work outside of the duties of the service required of him by his contract of service it is held that there is no liability to an employe who works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer. If the employe is, at the time of the injury, reasonably within the line of his duty he is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place of appliances, but he cannot be justly said to be within the line of his duty when he is doing an act solely for his own convenience. Some of the cases rest the rule that the master is not liable for injuries to a servant where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go, upon the ground of contributory negligence, but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employe goes solely for his own convenience."

Benson vs. Lancashire and Yorkshire Ry. Co., Law Reports, 1904, 1 King's Bench, p. 242. The question raised in the case is whether an engineer had suffered injuries arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act of 1897. It will thus be seen that the question in the case was whether the engineer was employed at the time of the injuries. The facts are rather lengthy, but as the decision

is strongly relied upon by us, we give them somewhat at length:

> "The deceased man had been employed by the respondents, the Lancashire and Yorkshire Railway Company, as an engine driver. He had, in order to commence his day's work, to go to an engine shed of the respondents, where his engine was, at 7:45 a. m., and to 'sign on' there. He lived in a road called Rigby Road, between a quarter of a mile and half a mile from the engine shed, and his proper way there was to go along that road to a gate which gave access to the railway, and on getting through that gate to proceed along a pathway to the left by the side of the line, which led to the engine shed without crossing over the rails. It appears that, previously to the date of the accident, some complaint had been made against him on account of a train driven by him having been late, and he had been called upon to make a report with regard to the matter. On the morning of the day on which the accident happened, he started from his home in Rigby Road at about 6 a. m., and proceeded to the before-mentioned gate. On getting through the gate, instead of turning to the left and going to the engine shed, he went in the opposite direction along the railway to a signal-box, which stood in the middle of the line with sets of rails on both sides of it, for the purpose of making inquiry of the signalman as to the precise time when the train driven by him, in respect of which the complaint was made against him, had passed the signal-box. It appeared that the signalman did frequently in such cases give information to engine drivers in order to oblige them, but that it was no part of their duty to do so. Having obtained the information which he required, the deceased man left the signal-box, and proceeded along the railway towards the engine shed. Rather more than an hour later he was found on the line seriously injured, having apparently been run down by a pilot engine which had passed in the meantime, and he subsequently died from his injuries. The spot where he was found was about two-thirds of the distance from the signal box to the engine shed."

The Court said:

"It seems to me, with regard to a person who is employed for a certain period, either of the day or night, that, during the period that he is so employed he is entitled to the privileges given by the Act; but, from the time when he leaves off work, say, in the evening, until he arrives at the spot where his employment is to commence again next morning, he is in the same position, as regards his employer, as any other member of the public, and is not within the protection of the Act. If he chooses to take a dangerous route to that spot, he takes it at his own risk. On the facts of this case, it appears to me clear that the place where the deceased's employment was to commence on the day in question was the engine shed, and that he had to get there, before his daily employment could be resumed. If he chose to go there by a dangerous route, instead of by the ordinary route, he did so at his own risk, and he had not entered upon his employment again until he got there. The judge has found, in effect, that, for his own purposes, the deceased went out of his way, and put himself in jeopardy, by going across the rails, instead of going by the safe route, to the shed, and but for that the accident would not have happened. One would have thought that on that finding the case would have been concluded in favor of the employers, but the learned judge goes on to give reasons for coming to the contrary conclusion. The fallacy which underlies his reasoning in what he subsequently said appears to me to be that it implies that the deceased's employment began when he left the signal-box. But he clearly had not gone there for the purpose or at the risk of his employers. If he had no business, so far as they were concerned, to go to the signal-box, it cannot be said, in my opinion, that his employment began, and that he was going to the shed at his employer's risk, when he left it. He had not entered on his employment, merely because he had got upon his employers' premises. A railway extends a long way, and a workman employed by the company does not enter upon his employment at any place where on any given morning he chooses to enter on their premises with a view of subsequently going to his work. The place where the deceased had to enter on his employment was the engine shed. It is not neces-

sary for the purposes of the present case to define precisely what is the extent of the area which might be included in the term 'engine shed;' for it certainly did not extend to the signal-box or to the spot where the deceased was found. It appears to me that the learned county court judge clearly misdirected himself in point of law in treating the deceased's employment as beginning directly he left the signal-box. There is nothing to show that it began before he reached the place where he had to report himself for work that morning, namely, the engine shed. For these reasons I think the appeal must be allowed."

We submit that under this rule there was no evidence to establish that intestate went into the roundhouse to discharge any duty of his employment and this, though the test of sufficient evidence of that of *scintilla* be employed. The trial Judge properly construed written rules 23 and 27 (R., p. 136) at defendant's request by charging (R., p. 147):

"'19. Rule 27 is clear that engineers are not responsible for, or under any duty connected with his engine after he is relieved from duty.' I charge you that.

"'20. Under Rule 23, an engineer has no duty to perform in connection with his engine before thirty minutes in advance of the leaving time of the train for which he is called.' I charge you that."

This charge became the law of the case and, being unexcepted to by plaintiff, settles beyond all peradventure that intestate was not employed when he went into the roundhouse after he had been relieved from duty by signing off at 10:30 p. m., and before he had even been called to go out on train No. 59 at 6:10 the next morning, and certainly more than one-half hour before that time. *Dent vs. Boyce*, 16 S. C., 1; *Tourles vs. Ry.*, 83 S. C., 504. And the evidence discussed heretofore shows beyond question that intestate was not in the line of his employment when he went into the roundhouse. His action was not justified by duty or custom.

SPECIFICATION THIRD.

The Supreme Court of South Carolina falls entirely into error in holding that the facts as found by it—entirely unjustified by the evidence as they are—justify the reasonable inference that intestate was discharging any duty of his employment when he went into the roundhouse.

The facts found by such Court (R., pp. 154-156) are that intestate was not required to inspect his engine, save a half hour before the scheduled leaving time of his train, when such engine had been brought out of the roundhouse and placed upon a track outside, in the yard. If intestate voluntarily undertook the inspection long before this time, in the dark, while such engine was in a dark and dangerous place, and without even availing himself of the torch given him to light his way when a light was proper, was he discharging a duty of his employment so as to call upon the master for a safe place to work? The master employs a man specifically to do a certain thing at a time certain and at a safe place. Does this employment cover the doing of the thing at a different time and in another unsafe place, by reason of which the alleged servant sustains injury? The answer is obvious. Elliott on Railroads, *supra; Patton vs. T. & P. R. Co.*, 179 U. S., 658, 45 L. Ed. 361; *Ellsworth vs. Metheney*, 104 Fed., 119, 44 C. C. A., 484; *Russell vs. Oregon Short Line*, 155 Fed., 22, 83 C. C. A., 618; *St. L. S. W. Ry. vs. Harvey*, 144 Fed., 806, 75 C. C. A., 536.

SPECIFICATIONS FOURTH AND FIFTH.

Suppose the roundhouse was incomplete, with no lights, and the pit open and unguarded. How can an employe whose duties do not carry him into the roundhouse be heard to complain because of these dangers? Can an employe demand that the master shall not have a dangerous place upon his premises when the employe is not required, in any wise, to come in contact with the danger? The question here is whether there was a duty to intestate incidental to the relation of master and servant. The ques-

tion of a license or invitation to intestate as a person, but not an employe, and any corresponding duty to intestate, is not in this case, because the Act imposes a duty only when the relation of master and servant exists.

The majority opinion disregards the two essential ingredients of actionable negligence. It awards damages when no legal duty existed on defendant, in favor of intestate, to have the roundhouse safe and when, even if it did, the violation thereof did not legally cause his death.

The fact that hostlers and machinists may have been required to go into the roundhouse would not impose on defendant a legal duty to use due care to have the roundhouse safe for another class of employes whose duties did not take them into the roundhouse and whose presence there defendant could not reasonably, and was not required legally, to anticipate. Probably the hostlers and machinists had been warned of the danger of going into the dark roundhouse without a light and furnished lights to avoid the dangers, if such warning could be necessary when the danger was so obvious.

There is no liability under this Act except in cases of negligence—the master is no insurer of his servant's safety. *Seaboard Air Line Ry. vs. Horton, supra.* There can be no negligence in the absence of a duty to take care, owed to the very person injured and in respect of the very matter or act charged as negligence. *Stone vs. Railroad Co.*, 96 S. C., 228, 238. Since the company could not anticipate intestate's presence in the roundhouse it was under no duty to make it safe for him.

It is needless to add that an abstract failure of defendant to have the roundhouse safe would not be actionable unless the proximate cause of intestate's death, and this inference can not be made from the evidence, since intestate's entrance into the roundhouse and fall into the pit could not be considered a "result naturally and reasonably to be expected therefrom." "It was not the natural and probable consequence and could not have been foreseen in the light of the circumstances attending the negligence of

the officers in charge of the" roundhouse. *Scheffer vs. Washington City, etc., Rd. Co.,* (15 Otto), 105 U. S., 449, 26 L. Ed., 1070; *Murphy vs. Rd. Co.,* 89 S. C., 15 at 23.

The denial of negligence and proximate causation put in issue whether intestate's death was caused entirely by his own negligence or careful act, under the South Carolina practice. *Kennedy vs. Ry.,* 59 S. C., 535. The only inference is that intestate's own voluntary act, in going into the dark roundhouse without even using the torch with which he was provided (R., p. 53), the dangers thereof being obvious, was the entire proximate cause of his own death. *Ellis' Admr. vs. L. H. St. L. Ry. Co.,* 160 S. W., 512.

SPECIFICATION SIXTH.

The rule for the determination of the question of assumption of risks under the Federal Act is distinctly stated by this Court in *Seaboard Air Line Ry. vs. Horton, supra,* as follows:

> "And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." . . .
>
> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as

> may be reasonably required for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Under the facts in this case, it is necessary for the Court to pass the first two points and find that there was sufficient evidence that intestate was employed in interstate commerce, and of negligence on the part of the defendant under the allegations of the complaint, before it comes to the consideration of this question, but assuming that the Court will reach the point, we submit that the undisputed facts admit of no other inference but that intestate assumed the risks.

Assuming that it was negligence to have the roundhouse unlighted and the pit open and unprotected, the chief danger was due to the darkness, which made the pit dangerous. The darkness was necessarily an obvious defect and danger, and intestate must have been aware of this defect and of the risk arising from it, at least, such defect and risk were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. Intestate was a workman of mature years, with many years of experience as a railroad engineer. He had been running into the Cayce yards for several months during the construction of the roundhouse and had made three trips in and out since the roundhouse had been in use. He had been into the roundhouse earlier on the very night in question. From such experience, intestate must have known and will be presumed to have known, under the rule stated, that roundhouses in general and this roundhouse in particular, contained tracks, engines, cars and pits, making it dangerous for one to walk therein in the darkness. So, clearly the case comes within the rule, that all of the defects and dangers were so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them. In the face of this

situation, intestate went in without using the torch given him to light his way. There is not the slightest suggestion but that intestate acted entirely voluntarily and under no immediate orders from any representative of the defendant; much less was there any suggestion that there was any complaint or objection on his part or any promise by the defendant to remedy the defects. It is submitted that these undisputed facts make a clear case of assumption of risks, within the rule quoted, and defendant was entitled to the direction of a verdict upon this ground.

SPECIFICATION SEVENTH.

It needs no comment to point out that the charge as to assumption of risks in plaintiff's requests numbered 6 and 11 was substantially erroneous under the Horton case. In fact, the charges in the two cases cannot be distinguished. In the sixth request, the jury was specifically instructed that "The servant does not assume the risks or hazards incident to the negligence of any of the officers, agents or employees of any such common carrier." In the eleventh request, the jury was instructed "He (the servant) does not assume the risks arising from the negligence of the master." They were then further instructed that the master was under a reasonable duty to furnish a safe place to work and that if he failed to do so, he was liable, thus again excluding the proposition that the servant might assume the risks incident to the defects in the place to work, although they were caused by the negligence of the master.

The jury were then properly instructed, later on in the case, by defendant's request numbered 8½, according to the true rule of the Horton case. The majority opinion says that although these instructions were inconsistent it could not have been prejudicial because "There was no word of testimony to show that Mr. Padgett knew or ought to have known of the open pit." (R. p. 156). Certainly there was testimony that Padgett had been in the roundhouse before that night, that he had been running into

Cayce for several months during the construction of the roundhouse and had made three trips in and out since it was completed. If the evidence reasonably admitted of the conjecture and speculation that when Padgett came to his death, he was going into the roundhouse to perform a well recognized duty, would it be any more conjectural or speculative for the jury to have found that on these numerous other occasions he had been into the roundhouse to perform some other duty? It seems to the writer that the jury should be allowed to speculate as well in favor of defendant as against it. But aside from this, it is not necessary that the servant know of the particular risk and it was not the open pit alone that was dangerous to Padgett, but it was the open pit combined with the darkness. The substantial evidence certainly entitled the jury to find that Padgett knew of the darkness and knew there were open pits and other dangerous things in the roundhouse, and voluntarily undertook to go into the same, without objection or complaint or promise of repair, and consequently assumed the risks.

We submit that the Court was in error in holding that defendant was not prejudiced by these inconsistent instructions, but that on the contrary, it was deprived of a substantial right under the Federal Act to have the jury consider the defense of assumption of risk, properly raised by the answer, and to sustain which there was certainly substantial testimony. Assuming that the jury was intelligent and conscientious and paid some attention to the charge, they could have reached an intelligent and conscientious verdict on this point by following the plaintiff's requests numbered 6 and 11, and excluding any consideration of the defense of assumption of risks, because they had previously found that the roundhouse was defective, due to the negligence of defendant.

CONCLUSION.

The cause of Padgett's death is purely speculative and conjectural. The only reasonable conjecture is that he

went into the roundhouse to go to sleep on his engine, but there are numerous other conjectures that may be made as to how Padgett fell into the pit and the real purpose for which he went into the roundhouse. Any one of these is equally as reasonable as the conjecture upon which the judgment was awarded, to wit, that he went in to inspect his engine.

We respectfully submit that the language of this Court in *Patton vs. Railway, supra,* is pertinent.

> "Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is also well said by the Court in *Greene vs. Railway,* 72 S. C., 398, as follows:

> "The cause of the accident is purely conjectural There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible. 'A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master.'"

SEABOARD AIR LINE RAILWAY *v.* PADGETT, ADMINISTRATRIX OF PADGETT.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 710. Argued February 24, 1915.—Decided March 22, 1915.

Where plaintiff in error seeks to review under § 237, Judicial Code, the judgment of the state court in a case arising under the Employers' Liability Act, this court may not consider non-Federal questions

which do not in their essence involve the existence of right to recover under the Federal statute.

Existence of power to review the judgment of the state court under § 237, Judicial Code, rests not merely upon form but upon substance and cannot arise from the mere assertion of a formal right which is so wanting in foundation and unsubstantial as to be devoid of merit and therefore frivolous.

While in this case the assignment of error on its face is not frivolous and gives jurisdiction to review, the proposition that the jury was misled by the instructions of the court in regard to the doctrine of assumption of risk is unfounded.

If the proof is sufficient to justify the submission of the case to the jury on the question of assumption of risk, there is no reversible error in so doing and in not instructing a verdict for defendant, and, as in this case, two courts below have concurred in finding that there was sufficient proof this court finds there was no error.

83 S. E. Rep. 633, affirmed.

THE facts, which involve the jurisdiction of this court of writs of error to review a judgment of the state court under § 237, Judicial Code, are stated in the opinion.

Mr. J. B. S. Lyles for plaintiff in error:

The right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was specially set up or claimed by defendant within § 237 of the Code.

This court will review the findings of fact in the lower courts under the circumstances of this case.

The legal conclusions of the state court upon facts found were erroneous.

There is evidence that the intestate came to his death while employed in interstate commerce within the act.

There is evidence of negligence proximately resulting in the death of plaintiff's intestate.

In support of these contentions see *Baker* v. *Telegraph Co.*, 84 S. Car. 477; *Benson* v. *Lancashire Ry.*, 1 King's Bench, 242; *Buist Co.* v. *Lancaster Co.*, 68 S. Car. 526; *Crosby* v. *Railway*, 83 S. Car. 575; *S. C.*, 81 S. Car. 31;

Dent v. *Bryce*, 16 S. Car. 1; *Ellsworth* v. *Metheny*, 104 Fed. Rep. 119; *Grand Trunk Ry.* v. *Lindsay*, 233 U. S. 838; *Guess* v. *A. C. L. R. R.*, 88 S. Car. 87; *Illinois Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Jones* v. *C. & W. C. Ry.*, 98 S. Car. 197; *McCord* v. *Blackwell*, 31 S. Car. 138; *Michigan Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *Miedreich* v. *Lauenstein*, 232 U. S. 236; *Mondou* v. *Railway*, 223 U. S. 1; *Murphy* v. *Railroad*, 89 S. Car. 15; *Nor Car. Ry.* v. *Zachary*, 232 U. S. 248; *Patton* v. *Tex. & Pac. R. R.*, 179 U. S. 658; *Pedersen* v. *Railroad*, 229 U. S. 150; *Russell* v. *Shore Line R. R.*, 155 Fed. Rep. 22; *Re Scheffer*, 105 U. S. 449; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *St. Louis S. W. Ry.* v. *Harvey*, 144 Fed. Rep. 806; *St. L., I. Mtn. & S. Ry.* v. *Hesterly*, 228 U. S. 702; *St. L., I. Mtn. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *Stone* v. *Atl. Coast Line*, 96 S. Car. 228; *Thompson* v. *Lee*, 19 S. Car. 489; *Towles* v. *Railway*, 83 S. Car. 504; *Wyatt* v. *Cely*, 86 S. Car. 539, 544.

Mr. W. Boyd Evans, with whom *Mr. James H. Fanning*, *Mr. W. H. Sharpe* and *Mr. A. D. Martin* were on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court which was entered on the verdict of a jury, and if so, was error below committed, are the questions for decision (83 S. E. Rep. 633).

The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the

early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit but also to properly light the roundhouse. If our jurisdiction attaches, it can only be because the right to recover was based upon the Act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employé of the company, actually engaged in interstate commerce. But as pointed out in *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265, 275, although the cause of action relied upon was based upon the Federal statute, nevertheless, "as it comes here from a state court, our power to review is controlled by Rev. Stat., § 709 [§ 237, Judicial Code] and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477; *St. Louis, I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281." The existence of jurisdiction to review under the principles just stated depends not merely upon form but upon substance; that is, in this class of cases as in others the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the

authority to examine and dispose of them. The trial court gave to the jury every instruction concerning the meaning and application of the Act of Congress asked by the company and therefore there is no ground whatever for saying that the view of the statute relied upon by the company was not given to the jury. But despite this fact two of the nine assignments of error insist that the jury was misled concerning the doctrine of assumption of the risk applicable under the statute because of two statements as to the law on the subject made by the court to the jury over the exception of the defendant which are asserted to have been confusing because possibly conflicting with each other. But while the proposition has sufficient strength to exclude the conception that the contention is frivolous, we are nevertheless of opinion that the court below was right in holding that even upon the concession for argument's sake that the two charges referred to if they had stood alone might have tended to give to the jury a mistaken conception of the law of assumption of the risk, nevertheless there was no reason for saying that they could have produced such a result in view of the express instruction concerning the doctrine of assumption of the risk as applied to the case in hand which was given by the court to the jury in the very words asked by the company, and which was so explicit as to dispel the possibility of misconception. Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied. And as from both of these points of view we are of opinion that there is no room whatever for the conclusion that any confusion or misconception as to the doctrine of assumption of the risk could have arisen from the particular statements which are relied upon, the proposition based upon them is without merit.

While this disposes of the two assignments which are directly and specifically concerned with the interpretation of the statute, nevertheless the remaining seven also raise questions of law under the statute, since they all in one form or another rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration. *Cresswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 276, 277; *Miedrich* v. *Lauenstein*, 232 U. S. 236, 243, 244; *Carlson* v. *Curtiss*, 234 U. S. 103, 106. Considering the case from this point of view we think the contention cannot be said to be frivolous since its solution is by no means free from difficulty, a situation which was manifested by the division of opinion which arose on the subject in the court below and by the further fact that some members of this court now consider the proposition as affording adequate ground for reversal. But although the question is not free from complexity, a majority of the court is of opinion that the proof was sufficient to justify the submission of the case to the jury and therefore the proposition affords no basis for holding that reversible error was committed because that course was pursued. As the considerations by which this conclusion is sustained depend solely upon an analysis of the evidence, and as a statement upon the subject therefore would amount only to giving a summary of the proof in this case and its tendencies involving no matter of doctrinal importance, for this reason and additionally in view of the fact that both the courts below have concurred in holding that there was no sufficient ground to take the case from the jury, we think it is unnecessary to state the proof and its tendencies and we therefore content ourselves with saying

that the contention that error was committed in not taking the case from the jury is found, after an examination of the record, to be without merit.

In the argument a contention was urged based upon some expression made use of by the trial court in refusing the request to take the case from the jury. Although we have considered the proposition and find it totally devoid of merit, we do not stop to further state the contention or the reasons which control us concerning it as we think it is manifestly an afterthought, as it was virtually not raised in the trial court and was not included in the assignments of error made for the purpose of review by the court below nor in those made in this court on the suing out of the writ of error.

Affirmed.